TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 555

ROBERT V. H. SUGDEN AND JEAN S. SUGDEN, HIS WIFE, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 6, 1955

CERTIORARI GRANTED JANUARY 30, 1956

No. 14405

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN,
Appellees.

Transcript of Record

Appeals from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellees.

In the United States District Court for the District of Arizona

No. C-11554—Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN, Defendants.

INDICTMENT

Viol. 18 USC 371 (Conspiracy to violate Immigration Laws)

The Grand Jury Charges:

Beginning on or about August 23, 1953, and continuing to and including September 18, 1953, in the County of Yuma, Arizona, in the State and District of Arizona, defendants Robert V. H. Sugden and Jean S. Sugden, and co-conspirators, not named as defendants, Robert Sommers, George Matthews, Horace Billingsley, Beal Billingsley and Lawrence Gerhart did knowingly, wilfully, feloniously, and in violation of 18 U.S.C. 371, agree, confederate, and conspire together to commit offenses against the United States, to-wit, did wilfully and knowingly conceal and shield from detection, and attempt to conceal and shield from detection, aliens who were not duly admitted into the United States of America by an Immigration officer or not lawfully entitled to enter or reside within the United States

of America under the terms of the Immigration and Nationality Act of 1952 (Public Law 414) or any other law relating to the immigration or expulsion of aliens, in violation of 8 U.S.C. 1324(a)(3).

The object of said conspiracy was to be accomplished as follows: The defendant Robert V. H. Sugden did cause to be installed in his home two-way radio equipment, from which his wife, Jean S. Sugden, did, at various times during the conspiracy dates as hereinbefore set forth, broadcast to radio equipped mobile units driven by defendant Robert V. H. Sugden and co-conspirators Robert Sommers, George Matthews, Horace Billingsley, Beal Billingsley and Lawrence Gerhart warnings that Immigration officers were enroute to cotton fields where the aforementioned described aliens were working, whereupon the aforementioned defendant and co-conspirators, who were driving the mobile units, would proceed to the cotton fields and conceal and shield from detection, and attempt to conceal and shield from detection, the aforementioned described aliens from Immigration officers.

To effectuate and in furtherance of the object of said conspiracy, the said defendants and co-conspirators did commit, among others, the following overt acts:

Overt Act No. 1

On or about August 23, 1953, in Yuma County, Arizona, co-conspirator Horace Billingsley did signal and shout to aliens, not duly admitted to the United States by an Immigration officer and not lawfully entitled to enter or reside within the

United States of America, that Immigration officers were *nearly,* and said aliens did thereupon conceal themselves from said officers.

Overt Act No. 2

On or about August 23, 1953, in Yuma County, Arizona, co-conspirator Lawrence Gerhart did place a person in a certain place for the purpose of watching for Immigration officers, after having received a warning that Immigration officers were in the general area.

Overt Act No. 3

On or about August 24, 1953, in Yuma County, Arizona, co-conspirator George Matthew did warn aliens, not duly admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, that Immigration officers were enroute to the cotton fields where said aliens were working and thereby did conceal and attempt to shield said aliens from detection.

Overt Act No. 4

On or about September 2, 1953, in Yuma County, Arizona, the defendant Robert V. H. Sugden did warn aliens not duly admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, that Immigration officers were approaching, whereupon said aliens did then and there conceal themselves from said officers.

Overt Act No. 5

On or about the following dates, in Yuma County, Arizona, to-wit, September 4, 1953, September 5, 1953, September 9, 1953, September 10, 1953, September 16, 1953, and September 18, 1953, the defendant Jean S. Sugden did broadcast over radio telephone base station KOG-285 that Immigration officers were enroute to the cotton fields for the purpose of causing aliens not lawfully admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America to conceal themselves from said officers.

Overt Act No. 6

On or about September 4, 1953, in Yuma County, Arizona, co-conspirator Robert Sommers did broadcast a warning over a radio telephone transmitter installed in a mobile unit to defendant Jean S. Sugden, who was operating radio telephone base station KOG-285, that Immigration officers were in the vicinity and that he would advise said defendant Jean S. Sugden of the actions of said Immigration officers.

Overt Act No. 7

On or about September 5, 1953, in Yuma County, Arizona, the defendant Jean S. Sugden did broadcast a warning over radio telephone base station KOG-285 to several radio equipped mobile units, that Immigration officers were going to raid the fields.

Overt Act No. 8

On or about September 5, 1953, in Yuma County, Arizona, the defendant Robert V. H. Sugden caused a person to go upon a hill for the purpose of keeping watch for Immigration officers.

Overt Act No. 9

On or about September 17, 1953, in Yuma County, Arizona, the defendant Robert V. H. Sugden told aliens not duly admitted to the United States of America by an Immigration officer and not lawfully entitled to enter or reside within the United States of America to conceal themselves when Immigration officers arrived.

A True Bill:

/s/ J. CLAYTON BAIN,
Deputy Foreman
/s/ EDWARD W. SCRUGGS,
United States Attorney

[Endorsed]: Filed October 7, 1953.

In the United States District Court for the District of Arizona

No. C-11555—Phoenix

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT V. H. SUGDEN, Defendant.

INDICTMENT

Viol.: 8 USC 1324(a) (3) (Conceal aliens)

The Grand Jury Charges:

Count One

On or about September 5, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, and attempt to conceal and shield from detection, an alien, to-wit, Pedro Madrigal-Ortiz, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

Count Six

On or about September 10, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, and attempt to conceal and shield from detection, an alien, to-wit, Juan Sanchez-Ramirez, which alien was not duly admitted by an Immigration officer

and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

Count Eight

On or about September 10, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, an alien, to-wit: Manuel Martinez-Palomino, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

Count Twelve

On or about September 17, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, an alien, to-wit, Raul Serrano-Rodarte, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324 (a) (3).

* * * * *

Count Sixteen

On or about September 18, 1953, in Yuma County, Arizona, District of Arizona, the defendant Robert V. H. Sugden, did wilfully, knowingly and feloniously conceal and shield from detection, an alien, to-wit: Jose Rodriguez-Galindo, which alien

was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America, in violation of 8 U.S.C. 1324(a)(3).

* * * * *

A True Bill:

/s/ J. CLAYTON BAIN,
Deputy Foreman
/s/ EDWARD W. SCRUGGS,
United States Attorney

[Endorsed]: Filed October 7, 1953.

In the United States District Court for the District of Arizona

No. C-11554—United States of America, Plaintiff, vs. Robert V. H. Sugden and Jean S. Sugden, Defendants.

No. C-11555—United States of America, Plaintiff, vs. Robert V. H. Sugden, Defendant.

No. C-11557—United States of America, Plaintiff, vs. Jean S. Sugden, Defendant.

No. C-11992—United States of America, Plaintiff, vs. Robert V. H. Sugden, Defendant.

MOTION TO SUPPRESS

Come Now the defendants in each of the above entitled and numbered causes and respectfully move the Court that an order be entered herein suppressing all records and transcripts of inter-

cepted radio communications and messages intercepted and recorded by the government of the United States emanating from any of the radio communications apparatus described in the various indictments filed herein and suppress all evidence of the government of the United States obtained by the use of such messages so intercepted, and to suppress the testimony of any witness obtained in the first instance by the government through the use of such messages and that of any witness whose recollection was refreshed or aided by such messages or through the use of such messages by the government of the United States.

These defendants further move the Court to direct and order that the United States Attorney or the Assistant United States Attorney engaged in the prosecution of each of these causes shall make no use of any information directly or indirectly obtained by the government through the use of any communications so intercepted, and direct and require that no questions may be framed and be put to any witness by the government of the United States if the information which forms the basis and reason for the posing of such question or questions was derived directly or indirectly by the government of the United States through any such intercepted communication.

In support of the foregoing motion, these defendants and each of them respectfully represent that they are informed and believe and therefore state that during the period within the dates set

forth in the various indictments filed herein the government of the United States had stationed in the Yuma area within which these defendants live, and were then carrying on their business operations equipment for the purpose of listening in, intercepting and tapping radio communication facilities of these defendants, which said interception and tapping was without the consent of these defendants and each of them, and an invasion of their privacy, constituted an unlawful search and seizure contrary to and in violation of the Fourth Amendment to the United States Constitution and in violation of the Federal Communications Act of 1934, Section 605 thereof; these defendants further represent they have never consented to such illegal interception and tapping of their communication system and the divulging of any messages so intercepted and the same was done without their consent and in violation of law.

Defendants, upon information and belief allege that information so obtained was used by the government in obtaining the names of witnesses to be called by the government, in interrogating such witnesses and in obtaining from such witnesses statements and admissions as to facts from which the government seeks to draw inferences adverse to these defendants. Defendants further allege, upon information and belief, that transcripts of said intercepted messages have been delivered to and have been in the possession of the United States Attorney and used by him in trial preparation and for

the purpose of obtaining information to be used by him upon the trial of these actions.

Respectfully submitted,

/s/ BRYANT W. JONES,
SNELL & WILMER,
/s/ By MARK WILMER,
Attorneys for Defendants.

Duly Verified.

[Endorsed]: Filed March 25, 1954.

[Title of District Court and Cause No. C-11554.]

MINUTE ENTRY OF NOV. 23, 1953

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for arraignment this date and for hearing on defendants' Motion to Dismiss, Motion to Strike and Motion for Bill of Particulars. William A. Holohan, Esq., Assistant United States Attorney, appears for the Government. The defendants, Robert V. H. Sugden and Jean S. Sugden, are present in person with their counsel Mark Wilmer, Esq.

Said motions are now argued by respective counsel, and

It Is Ordered that the record show the said motions are submitted.

The defendants are now duly arraigned, and waive the reading of the indictment. A copy of the

Indictment is handed to each of the defendants. Each of the said defendants pleads not guilty, which pleas are now duly entered.

It Is Ordered that this case be and it is set for trial Wednesday, February 3, 1954 at 10:00 o'clock a.m. subject to ruling on said motions.

[Title of District Court and Cause No. C-11555.]

MINUTE ENTRY OF NOV. 23, 1953

Honorable Dave W. Ling, United States District Judge, presiding.

This case comes on regularly for arraignment this date and for hearing on defendant's Motion to Dismiss and Motion for Bill of Particulars. William A. Holohan, Esq., Assistant United States Attorney, appears for the Government. The defendant, Robert V. H. Sugden, is present in person with his counsel Mark Wilmer, Esq.

Said motions are now argued by respective counsel and,

It Is Ordered that each of said motions be and it is denied.

The defendant is now duly arraigned, and waives the reading of the Indictment. A copy of the Indictment is handed to him. The defendant's plea is not guilty, which plea is now duly entered and,

It is Ordered that this case be and it is set for trial Wednesday, February 3, 1954, at 10:00 o'clock a.m.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF MARCH 25, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

These cases come on regularly for trial this day. William A. Holohan, Esq., Assistant United States Attorney, appears for the Government. The defendants, Robert V. H. Sugden and Jean S. Sugden are present in person with their counsel, Mark Wilmer and Bryant Jones, Esq.

It Is Ordered that cases numbered C-11554 and 11555 be consolidated for trial.

On motion of said counsel for the Government, pursuant to plaintiff's Motion to Dismiss heretofore filed in C-11555,

It Is Ordered that Counts two, three, four, five, seven, nine, ten, eleven, thirteen, fourteen, fifteen and seventeen of the Indictment in C-11555 are dismissed.

It Is Ordered that these cases be continued until 3:00 o'clock p.m. for trial, to which time all veniremen, defendants, witnesses and counsel are excused.

Subsequently at 3:35 o'clock p.m., respective counsel aforesaid, are present in chambers. On motion of said counsel for the Government,

It Is Ordered that Sidney Broffman, Esq., be entered as associate counsel for the Government.

Counsel for the defendants now present and file defendants' Motion to Suppress which is now argued by counsel.

It Is Ordered that said Motion to Suppress is denied at this time, subject to renewal at a later date.

Subsequently, at 3:50 o'clock p.m., the defendants and all counsel are present in open court.

It Is Ordered that all veniremen be excused until March 26, 1954 at 11:00 o'clock a.m. and that these cases be continued for trial until said time, and that the defendants' Motion to Suppress be continued for further hearing until March 26, 1954 at 9:30 o'clock a.m.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF MARCH 26, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

These cases come on regularly for trial this day. William A. Holohan, Esquire, and Sidney Broffman, Esquire, appear for the Government. The defendants are present in person with their counsel, Mark Wilmer, Esquire, and Bryant Jones, Esquire. The Government announces ready for trial. The defendants announce not ready.

All veniremen in attendance are now excused until Wednesday, March 31, 1954, at 10:00 o'clock a.m.

Further hearing is now had on the defendants' motion to suppress. Robert J. Stratton is sworn and cross-examined as an adverse party. Horace

Billingsley, Lawrence Gearheart, Beale Billingsley, Robert Sommers, Robert V. H. Sugden, Jean S. Sugden are sworn and examined on behalf of the defendants. Theodore Keiling is sworn and examined for the Government. Government's exhibits 1 and 2, Applications for radio operator license or permit, and exhibit 3, Certified copy construction permit and license, admitted in evidence.

Said motion to suppress is submitted to the Court.

It Is Ordered that said Motion to Suppress is granted, and

It Is Ordered that the indictment in case No. C-11554 Phoenix and the indictment in case No. C 1555 Phoenix be and they are dismissed.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF JUNE 2, 1954

Honorable James A Walsh, United States District Judge, Presiding at Tucson.

On Motion of Robert Roylston, Esq., Assistant United States Attorney, It Is Ordered that the plaintiff's time for filing the Record on Appeal and docketing the appeal, taken April 23, 1954, in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including June 16, 1954.

[Title of District Court and Causes C-11554-11555.]

MINUTE ENTRY OF JUNE 9, 1954

Honorable Dave W. Ling, United States District Judge, presiding.

On motion of William A. Holohan, Esq., Assistant United States Attorney,

It Is Ordered that the plaintiff's time to file the Record on Appeal and Docket the appeals herein in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including June 30, 1954.

[Title of District Court and Cause No. C-11554.]

NOTICE OF APPEAL

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona, hereby gives notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter.

The defendants, Robert V. H. Sugden and Jean S. Sugden, were indicted for conspiring to violate the Immigration laws of the United States by setting up a radio station in the defendants' home, which radio station was used to warn the defendants and their co-conspirators of the approach of

Immigration officers so that the defendants and the co-conspirators could conceal aliens unlawfully in this country; that in furtherance of the alleged conspiracy, certain overt acts were set forth which included the use of the radio in the defendants' home on dates set forth in the month of September, 1953.

On the 26th day of March, 1954, the United States District Court for the District of Arizona entered an order granting the defendants' motion to suppress evidence which had been obtained by the plaintiff, United States of America, through the use of monitoring apparatus used by the Federal Communication Commission to listen in on radio conversations had by the defendants Robert V. H. Sugden and Jean S. Sugden with other persons; on the same date above stated the Court also entered an order dismissing the indictment in the above-entitled matter.

Plaintiff, United States of America, hereby appeals from the order of the Court granting the defendants' motion to suppress evidence and from the order of the Court granting the defendants' motion to dismiss the indictment.

Dated at Phoenix, Arizona, this 23rd day of April, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney

[Endorsed]: Filed April 23, 1954.

[Title of District Court and Cause No. C-11555.]

NOTICE OF APPEAL

The United States of America, by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona, hereby gives notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter.

The defendant, Robert V. H. Sugden, was indicted for violating Title 8 U.S.C.A., Section 1324 (a)(3), by wilfully, knowingly and feloniously concealing and shielding from detection and attempting to conceal and shield from detection, an alien, to-wit, Pedro Madrigal-Ortiz, which alien was not duly admitted by an Immigration officer and not lawfully entitled to enter or reside within the United States of America; and four other counts which are identical with the count set out verbatim with the above, with the exception that the alien concealed in each count is named and is a different individual.

On the 26th day of March, 1954, the United States District Court for the District of Arizona entered an order granting the defendant's motion to suppress evidence which had been obtained by the plaintiff, United States of America, through the use of monitoring apparatus used by the Federal Communication Commission to listen in on

radio conversations had by the defendant Robert V. H. Sugden with other persons; on the same date above stated the Court also entered an order dismissing the indictment in the above-entitled matter.

Plaintiff, United States of America, hereby appeals from the order of the Court granting the defendant's motion to suppress evidence and from the order of the Court granting the defendant's motion to dismiss the indictment.

Dated at Phoenix, Arizona, this 23rd day of April, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney

[Endorsed]: Filed April 23, 1954.

In the United States District Court for the District of Arizona

No. C-11554—Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN, Defendants.

ORDER TO SUPPRESS EVIDENCE AND TO DISMISS

This Cause coming on to be heard on motion of defendants to suppress evidence alleged to have been obtained by plaintiff while monitoring certain radio broadcasts of defendants, and defendants, through counsel, having moved in open Court to dismiss the indictment in this cause, and evidence having been presented by all parties,

Now, Therefore, the Court finds that plaintiff has obtained information and evidence by monitoring certain radio broadcasts of defendants, and that the information and evidence so obtained was presented to the Grand Jury which returned the indictment in this cause, and that plaintiff has used the information and evidence, obtained as aforedescribed, to question witnesses and otherwise prepare for trial, and, lastly, that plaintiff intends to rely on the aforedescribed information and evidence to prove its case against defendants,

Therefore, it is the ruling of this Court that all evidence and information gained as above described be suppressed in this cause, and it is the further ruling of this Court that the indictment in this cause be dismissed on the grounds and for the reason that the said indictment is tainted by the fact that it resulted from the use by the Grand Jury of illegally obtained information and evidence, and also by the fact that said indictment was returned by the Grand Jury after its consideration of the aforedescribed illegally obtained evidence; and a further grounds for dismissal is the fact that the government must use the aforedescribed evidence in order to prove its case against defendants.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the indictment in the cause be dismissed.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed and Docketed May 5, 1954.

In the United States District Court for the District of Arizona

No. C-11555—Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT V. H. SUGDEN, Defendant.

ORDER TO SUPPRESS EVIDENCE AND TO DISMISS

This Cause coming on to be heard on motion of defendant to suppress evidence alleged to have been obtained by plaintiff while monitoring certain radio broadcasts of defendant, and defendant, through counsel, having moved in open court to dismiss the indictment in this cause, and evidence having been presented by all parties;

Now, Therefore, the Court finds that plaintiff has obtained information and evidence by monitoring certain radio broadcasts of defendant, and that the information and evidence so obtained was presented to the Grand Jury which returned the indictment in this cause, and that plaintiff has used the information and evidence, obtained as afore-described, to question witnesses and otherwise prepare for trial, and, lastly, that plaintiff intends to rely on the afore-described information and evidence to prove its case against defendants;

Therefore, it is the ruling of this Court that all evidence and information gained as above described

be suppressed in this cause, and it is the further ruling of this Court that the indictment in this cause be dismissed on the grounds and for the reason that the said indictment is tainted by the fact that it resulted from the use by the Grand Jury of illegally obtained information and evidence, and also by the fact that said indictment was returned by the Grand Jury after its consideration of the afore-described illegally obtained evidence; and a further grounds for dismissal is the fact that the government must use the afore-described evidence in order to prove its case against defendants;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the indictment in this cause be dismissed.

/s/ DAVE W. LING,
Judge, United States District Court for the District of Arizona.

[Endorsed]: Filed and Docketed May 5, 1954.

[Title of District Court and Cause No. C-11554.]

NOTICE OF APPEAL

The plaintiff and appellant, United States of America, is represented by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona.

Robert V. H. Sugden and Jean S. Sugden, defendants in the caption, were indicted for conspiracy to violate the immigration laws of the United

States, namely, Title 8 U.S.C.A. 1324(a)(3), by setting a radio station in the defendants' home and equipping defendants' pick-up trucks with two-way radio, and then defendants would warn each other and other co-conspirators of the approach of United States Immigration officers so that alien field workers could be concealed from arrest by the Immigration officers. Certain overt acts were set forth which included dates when defendants used the radio to warn of the approach of United States Immigration officers.

On May 5, 1954, the trial court signed and filed a formal written order suppressing the use in this cause of all evidence which plaintiff, United States of America, had obtained through one of its agency's (Federal Communications Commission) monitoring of radio broadcasts by defendants Robert V. H. Sugden and Jean S. Sugden; and, within the same afore-described order, the indictment in this cause was ordered dismissed.

The appellant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above stated order.

Dated at Phoenix, Arizona, this 11th day of May, 1954.

JACK D. H. HAYS,
United States Attorney
/s/ WILLIAM A. HOLOHAN,
Assistant U. S. Attorney
Attorneys for Appellant

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause No. C-11555.]

NOTICE OF APPEAL

The plaintiff and appellant, United States of America, is represented by Jack D. H. Hays, United States Attorney for the District of Arizona, and William A. Holohan, Assistant United States Attorney for said District, whose address is 204 U. S. Court House, Phoenix, Arizona.

Robert V. H. Sugden, defendant in the caption, was indicted on five counts of violating Title 8 U.S.C.A. 1324(a)(3) by unlawfully concealing and attempting to conceal five named aliens who were illegally in the United States of America.

On the 5th day of May, 1954, the trial court signed and filed a formal written order suppressing the use in this cause of all evidence which plaintiff, United States of America, had obtained through one of its agency's (Federal Communications Commission) monitoring of radio broadcasts by defendant, Robert V. H. Sugden, with other persons; and, within the same afore-described order, the indictment in this cause was ordered dismissed.

The appellant, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above stated order.

Dated at Phoenix, Arizona, this 11th day of May, 1954.

JACK D. H. HAYS, U. S. Attorney
/s/ WILLIAM A. HOLOHAN, Asst. U. S. Attorney, Attorneys for Appellant

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Causes.]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case No. C-11554 Phoenix, United States of America, Plaintiff, vs. Robert V. H. Sugden and Jean S. Sugden, defendants, and case No. C-11555 Phoenix, United States of America, Plaintiff, vs. Robert V. H. Sugden, Defendant, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said cases, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute entries, constitute the record on appeal in said cases as designated in the Appellant's Designations filed therein and made a part of the record attached hereto and the same are as follows, to-wit:

1. Indictment (C-11554).
2. Indictment (C-11555).

3. Motion to Suppress, (C-11554 and C-11555).

4. Reporter's Transcript, (C-11554 and C-11555).

5. Government's Exhibits 1, 2 and 3 (C-11554 and C-11555).

6. Minute entries of November 23, 1953, March 25, 1954, March 26, 1954, June 2, 1954, and June 9, 1954 (C-11554 and C-11555).

7. Notice of Appeal, filed April 23, 1954, (C-11554).

8. Notice of Appeal, filed April 23, 1954 (C-11555).

9. Order to Suppress Evidence and to Dismiss (C-11554).

10. Order to Suppress Evidence and to Dismiss (C-11555).

11. Notice of Appeal, filed May 11, 1954 (C-11554).

12. Notice of Appeal, filed May 11, 1954 (C-11555).

13. Designation of Record on Appeal (C-11554).

14. Designation of Record on Appeal (C-11555).

15. Statement of Points on Appeal (C-11554).

16. Statement of Points on Appeal (C-11555).

Witness my hand and seal for said court this 25th day of June, 1954.

[Seal] /s/ WM. H. LOVELESS,
Clerk

In the United States District Court for the District of Arizona

[Title of Causes No. C-11554, C-11555.]

TRANSCRIPT OF PROCEEDINGS

Proceedings had in the above entitled cause before the Honorable Dave W. Ling, Judge of said court, in his courtroom in the United States Courthouse, at Phoenix, Arizona, on the 25th day of March, 1954, at 3:45 o'clock p.m.

Present: Mr. William A. Holohan, Mr. Sidney Broffman, appeared for the Plaintiff. Messrs. Snell & Wilmer, by Mr. Mark Wilmer, and Mr. Bryant Jones, Yuma, Arizona, appeared for the Defendants. [1*]

(The following proceedings were had in the Court's Chambers, before the calling of the case in open court:)

Mr. Wilmer: May the record show that the defendants in the two causes which are to proceed to trial, that is, on the conspiracy charge and the charge of unlawfully concealing aliens, have presented their written verified motion to suppress the testimony of witnesses whose names were obtained through the use of interception by the Federal Communications Commission of radio communications.

It is requested the Court suppress any transcript

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

of such interceptions, and as more fully appears in the motion, I believe Mr. Holohan stated this morning there was such a transcript that was made.

Without going further, we would request at this time that the Court, prior to the trial, interrogate, or permit the interrogation of the co-conspirators named in the indictment but not charged for the purpose of ascertaining to what extent, if at all, these transcripts were used in obtaining their statements and in building the government's case.

In that respect, we have not felt at [2] liberty to talk to them, because they have been under subpoena as government witnesses, and we have been informed earlier that the transcripts were used.

On that basis, we request the court to ascertain in advance of the trial to what extent they were used, to avoid the interruption of the trial and the course of the trial.

The Court: The Court will deny the motion at this time, with leave to renew it at a later date, if it becomes necessary.

Mr. Wilmer: If it please the court, so I will understand I won't be interrupting, if in the course of the trial the government does use this transcription, is it the Court's ruling that they will be permitted to do so, and I need not make an objection at that time?

The Court: It is not necessary. At the conclusion of the government's case, if you deem it necessary, you can renew your motion.

Mr. Wilmer: What do we do then, your Honor, if the evidence is in and you find there is a par-

tial case without it, and it supplements the rest of the case?

The Court: I don't know what you would do in a case of that kind. [3]

Mr. Wilmer: Suppose in the course of his examination Mr. Holohan makes reference to this transcript?

The Court: All right. To protect your record, you will have a right to object. It would probably be the only way you could do it.

Mr. Wilmer: Then I take it that in every instance we will be required to request examinations of the witnesses on voir dire to ascertain if they are competent as witnesses before the government uses their testimony?

The Court: Off the record.

(Further discussion was had off the record.)

(The following proceedings were had in open court:)

The Clerk: C-11554, Phx., C-11555 Phx., etc., United States of America versus Robert V. H. Sudgen, et al, defendants. For trial.

Mr. Holohan: The government is ready, your Honor, in this matter.

We would like to introduce as co-counsel Mr. Sidney Broffman, a member of the bar of the Court of Appeals of the State of New York.

The Court: All right.

Mr. Wilmer: Pending the determination of the [4] motion, the defendants announce Not Ready, your Honor.

The Court: All jurors will be excused until to-

morrow morning at 11 o'clock. And you gentlemen be here at 9:30 in the morning to present your motion.

(Thereupon at 4:15 p.m. an adjournment was taken until the following morning.) [5]

March 26, 1954, 11:45 o'clock a.m.

The Court: You may proceed.

Mr. Wilmer: We would like to call for cross-examination, as an adverse party, Mr. Stratton of the Federal Communications Commission.

The Court: All right.

ROBERT J. STRATTON

called by the defendants as an adverse witness, for cross examination, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wilmer): Will you state your name, please? A. Robert J. Stratton.

Q. Will you tell us, please, what is your official position?

A. I am assistant engineer in charge of the [2] Eleventh District Office of the Federal Communications Commission.

Q. And where is your headquarters?

A. Los, Angeles, California.

Q. Does that region or district include Arizona and Nevada?

A. All of Arizona, Clark County in Nevada, and all of southern California.

Q. You have held that position for some time, have you? A. Fourteen years.

(Testimony of Robert J. Stratton.)

Q. Mr. Stratton, in connection with your work in your position there, did you have occasion to go to Yuma in September, I believe it was, of 1953?

A. I did.

Q. When did you get there?

A. The 4th of September, I believe.

Q. And by whom were you accompanied?

A. I wasn't accompanied by anyone. I was by myself.

Q. By yourself? A. Yes.

Q. Did you have any equipment of any type with you? A. Yes.

Q. What did that consist of? [3]

A. The usual direction finder and monitoring equipment.

Q. By monitoring equipment, you mean equipment used to intercept and hear radio signals?

A. Well, radio frequencies or carriers of any kind, whether there is any signal on them or not.

Q. What was the occasion for your coming to Yuma?

A. We were directed by our Washington office to make an investigation on the basis of a complaint filed by the Department of Justice in Washington.

Q. Claiming that there was occurring in the area, or there was suspicion that there was occurring in the area an offense against the laws of the United States?

A. An illegal use of radio, that is right.

(Testimony of Robert J. Stratton.)

Q. And that was the occasion for your going there? A. That is right.

Q. And your purpose was to intercept and hear all radio frequencies and the use of the radio in that area.

A. Our purpose was to confirm that the radio was being used for a purpose other than authorized.

Q. May I put it this way? Your purpose was to hear what was going on, and determine what was [4] going on? A. Yes.

Q. How long were you in the Yuma area?

A. Only one day the first time, and then I was sent back again on the 10th of September, and then again on the 18th.

Q. Were you there just on three days?

A. I believe I just spent one night. I was busy there the 9th, and 10th, and the 18th. I made three trips, I know.

Q. On each occasion were you alone?

A. No. On the second occasion two of us were dispatched from Los Angeles.

Q. Two cars, is that correct?

A. Two cars.

Q. Both equipped with this equipment——

A. Both identical automobiles.

Q. For the purpose of intercepting radio signals and frequencies?

A. No, the purpose of the two cars was not for interception. It was for location. We have to have two for triangulation.

(Testimony of Robert J. Stratton.)

Q. In other words, to determine the point from which the frequency was emanating?

A. That is correct.

Q. Did you, while you were in Yuma, meet Mr. [5] and Mrs. Sugden? A. I did.

Q. When did you meet them?

A. On the 18th, when I made a routine inspection of their station.

Q. That was the first time you had ever talked to them?

A. That was the first time I had ever talked to them. I had seen Mr. Sugden, however, once before.

Q. In the course of your investigation?

A. That is right.

Q. Where did you see the Sugdens?

A. I saw Mr. and Mrs. Sugden in their home on the 18th.

Q. And in the course of that meeting there, you went through the usual routine inspection?

A. That is correct.

Q. Did you advise them at that time that you had been monitoring their station and their use of the station? A. No, I did not.

Q. Did you at any time prior to the time you did monitor, and if I may use the layman's language, listen to the conversation, talk with them or advise them that you intended to do so? [6]

A. No, sir, certainly not.

Q. Then I take it they at no time advised you, or consented that you might do so?

A. That is correct.

(Testimony of Robert J. Stratton.)

Q. I believe on that occasion that you left with Mrs. Sudgen, in any event, a mimeographed set of your rules and regulations, and so forth?

A. Not mimeographed, no. They are regular printed rules from the Goverment Printing Office.

Q. She had advised you that they had been advised they were out of print, and you said they were not, and left her one, is that correct?

A. I gave her my own copy.

Q. Is it not a fact that she had been advised they were out of print?

A. That is, as far as I know, what she said.

Q. And that is their reason for not having one on hand?

A. I naturally assume that was their reason.

Q. Now, during the time you were doing this monitoring, Mr. Stratton, how did you record the words that you heard through the use of your equipment?

A. Well, the first day I made no recording at all, except pencilled notes in a notebook, and since the transfer occasions were coming faster [7] than I could copy them, the next time I did use a portable tape recording.

Q. That was used on the last occasion?

A. On the 10th and 18th.

Q. Or 9th and 18th?

A. 9th and 18th, yes. Excuse me.

Q. Did you spend the entire day in each instance in monitoring? A. No.

Q. Just portions of the day?

(Testimony of Robert J. Stratton.)

A. During periods of activity. We obviously would cease for lunch, and later in the afternoon when apparently the activity in the fields would stop, there was no point in further monitoring.

Q. Other than for the time when the equipment was not in use you did monitoring?

A. We monitored for other things, yes; for out of state signals coming into the state, for instance, that could have possibly been interfered with, yes.

Q. Now, when this matter was taken down, Mr. Stratton, what was done with it, the transcripts that were made and the notes that you took of the monitored information?

A. They were sent to Washington.

Q. To the offices there? [8]

A. That is right.

Q. And did you keep copies of them?

A. Oh, we always keep copies in our own files, yes.

Q. When was the first time that these conversations, if I may call it as such, were delivered to the Immigration Service?

A. There was probably a copy under confidential cover of each one within a day or two after the transcript was made.

Q. During the course of your visit here, your various visits here, Mr. Stratton, did you work with the Immigration Service in the sense of—I mean, you were in contact with the Immigration Service there at Yuma?

A. Well, in the sense that I stopped by the

(Testimony of Robert J. Stratton.)

office on my way to Yuma. We don't have any radio contact. We weren't on the same frequency.

Q. You did see them during the time you were there at various times?

A. Yes, I was ordered to on my first trip, because, obviously, the complaint was on the basis of their complaint.

Q. Did you report to various of the immigration officers there the substance of the conversations which you had taken? [9]

A. Only to the effect that their suspicions were correct.

Q. Well, now, you did then give them some of the context or general idea of what they were?

A. General idea, possibly, yes.

Q. Pardon?

A. Possibly in a general idea, yes, but not verbatim.

Q. You didn't give it specific play by play contact? A. No.

Q. Generally, what you had learned?

A. Yes.

Q. Who did you talk to there?

A. I believe it was the chief, Parker, the first one of the Immigration Service.

Q. Did you also talk to Mr. Richards?

A. Possibly. We were all together.

Q. Together on the thing?

A. Yes, sir, they were all at the office at the time, in the Yuma office.

Q. I understand that that is the Yuma office of

(Testimony of Robert J. Stratton.)

the Immigration Service? A. That is right.

Q. That was the time on the 4th, and then subsequently on the 9th and 10th, and on the 18th?

A. Very likely. I don't remember whether Chief Parker was there on the 18th or not.

Q. Then subsequently, Mr. Stratton, what if anything did you do with respect to any prosecution that was instituted? When was your next contact with the case?

A. Nothing whatever until I was supposed to appear before the Grand Jury.

Q. And when you appeared before the grand jury, you were supposed to testify with respect to what you had picked up down there in the way of conversations?

A. Well, my testimony was a running account of what had happened from the time we were first called in on the case.

Q. I take it, in other words, that you testified in considerable detail, then, before the grand jury as to the contents of the various communications which you had monitored and transcribed?

A. I wouldn't say in great detail, no. Generally.

Q. Other than for that part of your testimony, what else did you testify with reference to?

A. Well, on the methods used in locating the base station. For instance, since the address was very vague on the license, it meant nothing, in [11] fact, as far as locating the station. We used direction finders for that.

(Testimony of Robert J. Stratton.)

Q. You had no difficulty when you got to Yuma, did you?

A. I had extreme difficulty. The address on the license is "9 miles south of Yuma." That is a lot of territory.

Q. Of course, the immigration people knew where the Sugdens lived, didn't they?

A. Apparently not. If they did, they didn't give us the directions.

Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

A. That is correct, the general use of the radio in that particular case.

Q. Since that time, Mr. Stratton, have you had any further connection with the present case that is pending now here?

A. Other than numerous trips for——

Q. What has been the purpose of those trips?

A. I was called for a trial in February.

Q. Other than that, have you had occasion to [12] work with the U.S. Attorney in preparation of this case?

A. No. Little, if anything, other than to confirm the reports that we had sent to the Immigration Service. I am not an attorney.

Q. I understand that, but from the standpoint

(Testimony of Robert J. Stratton.)

of furnishing factual information as to the substance of the transcripts taken, if I may use that phrase, were those gone over with the United States Attorney?

A. Well, we didn't send any to the U.S. attorney.

Q. Did he have them when you talked with him?

A. I saw no copies of our reports. He had copies of immigration reports there.

Q. The U.S. attorney did have a knowledge of the substance of the communications which you had monitored, is that right?

A. I am under the impression he had the general information, although I did not read his reports, nor did I read the reports furnished him by the Immigration Service.

Q. How many times did you confer with the United States Attorney on that?

A. Just before the Grand Jury hearing. It was once. [13]

Q. Well, subsequent to the Grand Jury?

A. Well, the one day before the trial that was set for February, and one day before this one, Tuesday.

Q. Going over with him the substance of the conversations you heard, to which you proposed to testify?

A. Actually, this last trip, no. That was more concerned with other witnesses. Very little was said about me.

(Testimony of Robert J. Stratton.)

Q. Mr. Stratton, your trip here in February, then—— A. Yes?

Q. And your conference with the U.S. Attorney was for the purpose of going over with him the testimony you would give as to the communications which you had heard? A. That is correct.

Q. And you went over that with him?

A. In February, that is right.

The Court: We will suspend at this point until two o'clock.

(Thereupon, at 12:00 o'clock noon a recess was taken until two o'clock p.m. of the same day.) [14]

The Court: You may proceed.

ROBERT J. STRATTON

resumed the stand and testified further as follows:

Mr. Wilmer: We have no further questions.

Cross Examination

Q. (By Mr. Holohan): Now, Mr. Stratton, in the course of your monitoring of the Sugden's radio, were you at any time close to the border of Mexico? A. Yes, I was.

Q. And in relation to that, where were you?

A. I would say within 75 feet on the American [15] side of the fence.

Q. And you were receiving radio signals from the Sugdens at that time? A. Yes, sir.

Q. You have examined the radio station of the Sugdens? A. Yes, sir.

(Testimony of Robert J. Stratton.)

Q. And on the basis of that examination, could you give an opinion, from your knowledge, as to approximately how far that station could send signals?

A. Well, with the antenna they were using, or the frequency, I would say certainly a good coverage up to a 70-mile radius, under certain conditions farther.

Q. And this monitoring took place in and around the territory of Yuma, Somerton, and near the Mexican city of San Luis?

A. That is right.

Q. That is approximately how far from the border of California and Arizona?

A. Well, Yuma is right on the border of California, and San Luis is approximately 20 miles to the south of Yuma, or southeast, possibly, a little.

Q. Based on what you have learned, would you say that signals from the Sugden radio would carry across into Mexico, and across into California?

A. Oh, definitely.

Q. Now, I note that you have a file there. May I have that for a moment?

A. Yes. (Handing to counsel.)

Q. In your duties with the Federal Communications Commission, do you have anything to do with licensing operators?

A. Operators, yes.

Mr. Wilmer: With operators?

The Witness: Operators only.

(Testimony of Robert J. Stratton.)

Q. (By Mr. Holohan): What do you have to do with that?

A. We accept the applications. On some types of licenses we require an examination. Others are called permits, which do not require an examination, and there is required merely the submission of an application, upon receipt of which, if they are properly completed, a permit is issued.

Q. Now, do you recall anything in regard to the defendants in this case, Robert and Jean Sugden, with respect to licenses?

A. Yes, they each filed an application, which was incomplete, and had to be returned to them. It was returned to them.

Mr. Holohan: I will ask that this be marked [17] Government's Exhibit 1 for identification.

The Clerk: Government's Exhibit 1 for identification.

(Said document was marked Government's Exhibit 1 for identification.)

The Witness: May I ask here that the originals be returned, because they are part of our file.

Mr. Wilmer: On counsel's statement, we will agree that a photostat may be substituted and marked in lieu of the originals.

Mr. Holohan: All right.

The Court: All right.

Mr. Holohan: You have seen these photostats, Mr. Wilmer?

Mr. Wilmer: If you say they are all right, it is satisfactory.

(Testimony of Robert J. Stratton.)

The Clerk: Government's Exhibit 2 for identification.

(Said document was marked Government's Exhibit 2 for identification.)

Q. (By Mr. Holohan): I will hand you Government's Exhibit 1 here, with regard to the licensing of what purports to be Robert Sugden.

Are you familiar with that?

A. Yes, I am. [18]

Q. How are you familiar with it?

A. I am familiar with it in that it was received at our office at one time, approximately the 9th of September, and had to be returned because of incomplete answers in the application. And that on the 17th of September, the permit was issued from our office.

Q. Now, is this permit a copy of the application taken from the files there in Los Angeles?

A. This is taken from our files in Los Angeles, yes, sir.

Q. Do you have anything to do with the files?

A. Yes, as assistant engineer in charge, I have joint custody with the engineer in charge.

Q. I will hand you Government's Exhibit 2 and ask you the same questions with regard to that?

A. Yes, the answers would be exactly the same in both cases.

Q. I will now ask you with regard to Government's Exhibits 1 and 2 for identification, whether they have what purports to be signatures on them?

A. Yes, they do.

(Testimony of Robert J. Stratton.)

Q. And what are the signatures on Government's Exhibit 1?

A. Robert V. H. Sugden.

Q. And what is the signature on Government's [19] Exhibit 2? A. Jean S. Sugden.

Mr. Wilmer: We have no objection other than the regular objection to materiality, your Honor.

The Court: All right, they may be received.

The Clerk: Government's Exhibits 1 and 2 in evidence.

(Said documents were received in evidence and marked Government's Exhibits 1 and 2.)

Q. (By Mr. Holohan): Government's Exhibits 1 and 2 show the date when the license was actually issued by the Federal Communications Commission? A. Yes, sir.

Q. Do you recall when that was?

A. September 17, 1953.

Mr. Holohan: That is all we have for you at this time, Mr. Stratton.

Mr. Wilmer: Just a couple of questions, if I may.

Redirect Examination

Q. (By Mr. Wilmer): In connection with these Exhibits 1 and 2, do you recall, or can you tell from looking at them which were the omitted blanks? A. Those that are checked. [20]

Q. Those are checked?

A. Those that are checked, that is right. They were checked in red, originally, on the originals. It shows white on these.

(Testimony of Robert J. Stratton.)

Q. And they were then returned with an instruction to complete them?

A. To complete the form, yes. There is a little mimeographed slip that is attached to them.

Q. I take it that these are the type of permits which issue as a matter of course if the application that is filed is completed, and there is nothing on it that indicates some objection, is that right?

A. That is correct. If the person is a citizen, and indicates on the rear that they are completely familiar with the rules and regulations, then they are issued as a matter of course. And of course, no prison, conviction of felony——

Q. No felony history?

A. That is right.

Q. So that the type of permit which is issued here does not require an examination, or anything of that nature? A. No, it does not.

Mr. Wilmer: That is all.

Mr. Holohan: One question. [21]

Recross Examination

Q. (By Mr. Holohan): This type of license is required before an operator can legally operate a radio?

A. That is correct. This type of license is required for this particular type of radio. There are other types which require a higher class license.

Mr. Holohan: That is all I have.

Mr. Wilmer: That is all.

(Witness excused.)

HORACE BILLINGSLEY

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Horace Billingsley.

Q. Mr. Billingsley, you live in Yuma County, Arizona, do you not? A. Yes, sir.

Q. Were you employed by the defendant, Robert V. H. Sugden, last year? A. Yes, sir.

Q. And during the month of September, 1953, were you employed by Mr. Sugden?

A. Up through the 9th of September, yes. [22]

Q. And you terminated your employment with him at that time, is that correct?

A. Yes sir.

Q. Now, at any time during the month of September, 1953, were you brought to Phoenix, Arizona? A. Yes, sir.

Q. Do you recall the date when you were brought to Phoenix? A. No, sir, I don't.

Q. Was it the latter part of September, or the middle part?

A. It was somewhere around the middle or the latter part.

Q. Of September? A. Of September.

Q. And who brought you to Phoenix?

A. The Immigration Service, Mr. Richards.

Q. Did anyone else accompany you?

A. Yes, sir. Mr. Cameron and a Mexican.

(Testimony of Horace Billingsley.)

Q. In fact, your brother was also along, was he not? A. He was in another car.

Q. All right, now, what happened when you arrived in Phoenix at that particular time?

A. We were taken before the United States attorney. [23]

Q. And do you recall his name?

A. Yes, sir, Mr. Scruggs.

Q. Did you have any conversation with Mr. Scruggs at that particular time?

A. Yes, sir.

Q. And was that conversation concerning these particular charges that have been filed here?

A. Yes, sir.

Q. During the course of that conversation, were you shown any transcriptions purportedly from the two-way radio operated by Mr. Sugden in his operation? A. No, sir.

Q. Were you told by anyone during the course of this conversation that the conversations during the month of September emanating from the radio station and the pickup trucks had been monitored or transcribed? A. Yes, sir.

Q. And who told you that?

A. Mr. Scruggs.

Q. Did anyone else during that conversation mention the transcription of these radio communications? A. No, sir.

Q. Do you recall what Mr. Scruggs said about [24] the transcripts?

A. He said that he had it on record.

(Testimony of Horace Billingsley.)

Q. Did he elaborate on that? A. No, sir.

Q. And by that what did you believe he meant?

A. That he had a wire recording of the——

Q. Conversations? A. Conversations.

Q. Which had taken place during the course of your employment? A. Yes, sir.

Q. By Mr. Sugden over this radio communication apparatus, is that correct? A. Yes, sir.

Q. Now, did Mr. Scruggs question you in respect to the use of the radio by Mr. Sugden, and you, and the others? A. Yes, sir.

Q. And what did he ask you in connection with the radio?

A. If we used them to hide the Mexicans.

Mr. Jones: That is all.

Cross Examination

Q. (By Mr. Holohan): Who was present at this interview that you speak of? [25]

A. Mr. Richards.

Q. That is the man from El Centro?

A. Yes, sir.

Q. And Mr. Scruggs, the then U. S. attorney?

A. Yes.

Mr. Holohan: That is all we have.

Mr. Wilmer: That is all.

(Witness excused.)

LAWRENCE THOMAS GERHART

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Lawrence Thomas Gerhart.

Q. You also live in Yuma County, do you not, Mr. Gerhart? A. Yuma County.

Q. And last year you were employed by Robert V. H. Sugden, were you not? A. Yes, sir.

Q. When did that employment terminate, Mr. Gerhart? A. On the 16th of September.

Q. Now, just prior to, or after the termination [26] of your employment, did you have any conversation with any of the immigration officers concerning the use of the two-way radio?

A. Yes.

Q. And where and when, if you recall, did that conversation take place?

A. I don't know exactly the dates, but it was in Yuma. They took me in to Yuma, Mr. Richie, and some other guy I don't recall his name.

Q. And where did they take you from, Mr. Gerhart? A. My house.

Q. And they took you in to Yuma, is that correct? A. Yes.

Q. Was that after you had quit working for Bob? A. Yes, that is right.

Q. And where did they take you in Yuma?

A. Oh, the immigration building there, I believe they call it.

(Testimony of Lawrence Thomas Gerhart.)

Q. And that was Mr. Richie and some other person, is that correct? A. Yes.

Q. Now, did you have a conversation with them at that time in regard to the use of the two-way [27] radio? A. Yes.

Q. And what if anything was asked you concerning the use of that radio?

A. Well, I don't know. It was quite a bit. So much I can't remember, but we talked a good half a day there on it, I believe.

Q. And did either of these men, or anyone else, say anything to you about having monitored and made transcriptions of conversations on that two-way radio? A. Yes.

Q. And do you recall what was said in that regard?

A. Well, I don't know. It seemed like they said something about not getting off on the wrong foot, or something, that they had recordings of the conversations that was carried on over the radios, and they let me read something there. It seemed like they had some kind of a recording. I don't know. I didn't read but just a little of it.

Q. They handed you a paper which had something on it, and you read from it, is that correct?

A. Yes.

Q. Did that appear to be a transcript of any of the conversations? [28]

A. Well, it seemed to be, yes, it did.

Q. Was it a conversation in which you were involved? A. No.

(Testimony of Lawrence Thomas Gerhart.)

Q. I see. Do you recall any names on this paper?

A. Well, there was one name, but it didn't ring true to me, and so I quit reading it right there, when I seen the name that wasn't familiar.

Q. Did there seem to be many—Did they seem to have very many of these transcripts?

A. Well, as best I can remember, it seemed like there was four or five pages.

Q. But they handed you just one?

A. No, they was all together.

Q. And did you go through all of them?

A. No, no.

Q. In order that we may be clear, would you say that one of them said, Let's don't get off on the wrong foot, we have everything down here?

A. Well, it seems that the way it appeared they might have thought that I might start lying, or something or other, and it seems that they wanted me to know right away that they had records of the conversation that went over the radios.

Q. And they were referring to the two-way [29] radio that Bob Sugden was operating?

A. That is right.

Q. Mr. Gerhart, did you appear before the Grand Jury in Tucson? A. Yes, sir.

Q. Were you questioned before the Grand Jury in regard to the use of this two-way radio?

A. I don't think so. I don't recall whether they mentioned it or not.

Q. Now, other than the conversation that you have just testified to, in which Mr. Richie and one

(Testimony of Lawrence Thomas Gerhart.)

other person was present, did you have any other conversations with any immigration officials, or other officers of the U.S. government in regard to the use of this two-way radio?

A. No, I don't recall.

Mr. Jones: I think that is all.

Cross Examination

Q. (By Mr. Holohan): This questioning that they had by Mr. Richie that started out down in Yuma, did that statement of his that he had the recordings, was that to induce you to testify or disclose information to them, or were you a willing witness to begin with?

A. Oh, I was a willing witness to begin with.

Q. And you could find no information, to your [30] knowledge, of any transcription containing your name, or there was not any mention of that, was there, at that particular conversation?

A. Well, since I didn't read it, why, I just pushed it back across the desk, and he was asking me questions about our operations down there, and wanted to know how I identified the camp. And I believe I told him I had always called the camp "D", and it appeared to me like he was going along with what I was saying, that he had it recorded on this paper, and he said,—I believe he beat me to that, that you identified your camp as "D", or something, and I said yes. And I just figured——

Mr. Holohan: That is all I have.

The Witness: Thank you.

(Testimony of Lawrence Thomas Gerhart.)

Mr. Jones: That is all.

(Witness excused.)

Mr. Jones: Mr. Beal Billingsley.

BEAL BILLINGSLEY

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Beal Billingsley.

Q. And you also live in Yuma County, do you [31] not, Mr. Billingsley? A. Yes, sir.

Q. And you are a brother of Horace Billingsley who has just been on the stand?

A. Yes, sir.

Q. Last year you were employed by Robert Sugden, were you not? A. Yes, sir.

Q. And when did that employment terminate?

A. About the first of June.

Q. First of June of last year?

A. Yes, sir. I think that is about right, yes, sir. That was when I went to work for him on his place, at that time.

Q. That is when you commenced working for him? A. Yes.

Q. And when did you finish working for him?

A. I am still working for him.

Q. I see. All right. Now, do you recall coming to Phoenix during the month of September, 1953?

A. Yes, sir.

(Testimony of Beal Billingsley.)

Q. Do you remember the approximate date you came to Phoenix?

A. No, sir. Somewhere along the latter part of September. [32]

Q. And with whom did you come to Phoenix?

A. Mr. Richie, the immigration officer.

Q. Was anyone else in the car?

A. Yes, sir, there was another fellow with us.

Q. And what happened after you got to Phoenix?

A. We was brought up before the U.S. attorney, Mr. Scruggs.

Q. And were you and Horace in there at the same time? A. No, sir.

Q. Who was in Mr. Scruggs' office when you were there?

A. Mr. Richards and another fellow, I don't remember his name.

Q. And was there any conversation carried on then concerning the use of the radio equipment owned by Mr. Sugden? A. Yes.

Q. And what was that conversation, as best you recall it, Mr. Billingsley?

A. Well, he just asked us about the radios and what use they used them for.

Q. Now, did Mr. Scruggs, or anyone else present tell you that they had transcripts of the radio conversations? A. No, sir. [33]

Q. No one told you that?

A. No, sir.

Q. At any time on your way to Phoenix, ac-

(Testimony of Beal Billingsley.)

companied by the immigration officers, did they tell you that they had transcripts of the radio conversations? A. No, sir.

Mr. Jones: That is all.

Mr. Holohan: No questions.

(Witness excused.)

Mr. Jones: Mr. Sommers.

ROBERT F. SOMMERS

called as a witness by the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Jones): Will you state your name, please? A. Robert F. Sommers.

Q. Where do you live, Mr. Sommers?

A. In Tucson.

Q. And were you employed by Robert Sugden last year? A. Yes, sir.

Q. And when were you employed by him?

A. From about the 1st of August to about the 18th of September. [34]

Q. Now, after the termination of your employment with him, were you called to testify before the Grand Jury in Tucson? A. Yes.

Q. Do you remember about when that was?

A. No.

Q. Sometime after you finished working for him, is that correct?

A. Yes, sir, it was a couple of weeks. It was about the first week in October, I think.

(Testimony of Robert F. Sommers.)

Q. Now, did anyone at the time of your testimony before the Grand Jury, or before, talk to you about the use of a two-way radio?

A. Yes.

Q. And who talked to you about that?

A. I believe it was Mr. Richards questioned me just before the Grand Jury hearing.

Q. And in the course of that conversation, did Mr. Richards indicate to you that he had transcripts of the radio conversations? A. Yes.

Q. And what did he say in connection with that?

A. Well, he asked me a couple of questions, and I kind of hesitated there, and he said, Well, you know, we have transcriptions of all the radio [35] conversations.

Q. And that is what Mr. Richards told you?

A. Yes.

Q. Did you have any further conversation with him? A. No.

Q. Then you testified before the Grand Jury, is that correct? A. Yes.

Q. And did you testify concerning the radio conversations before the Grand Jury?

A. I don't remember.

Q. At the time of your testimony before the Grand Jury, were you shown any transcripts of the radio conversations? A. No.

Q. Have you had any conversation with any other immigration officers or other United States officers since that time concerning the use of the radio? A. Yes.

(Testimony of Robert F. Sommers.)

Q. And when was that?

A. About a month ago, in Tucson.

Q. And whom did you talk to at that time?

A. Mr. Kimres. He is an immigration officer in Tucson. [36]

Q. And did you discuss at that time the use of the radio? A. Yes.

Q. Was anything said about the transcripts at that time? A. No.

Mr. Jones: I think that is all.

Cross Examination

Q. (By Mr. Holohan): Who was present, if anyone, when you had this conversation with Mr. Richards?

A. Well, no one was there all the time, but Mr. Richie come in now and then. He was talking to George and some other fellow. I think he worked for the radio. He wasn't the one that was here a minute ago, a younger one. He was there toward the last when he was asking me questions.

Q. And do you recall, when this conversation concerning transcriptions came up, do you remember who was present then?

A. No, I believe just he and I were there.

Q. Was that at about the beginning of the interview?

A. Yes, just after he started asking me questions.

Q. To the best of your recollection, then, [36a] just you and Mr. Richards? A. Yes.

(Testimony of Robert F. Sommers.)

Q. Were present? A. Yes.

Mr. Holohan: No further questions.

Mr. Jones: One more question.

Redirect Examination

Q. (By Mr. Jones): During this conversation with Mr. Richards, were you shown any transcripts? A. No.

Q. Did you see any transcripts in his possession? A. No.

Q. Now, did the other man whom you thought to be connected with the Communications Commission, or described as a radio man, when he was present, did he have anything to say about the transcriptions? A. No.

Mr. Jones: I think that is all.

Mr. Holohan: That is all I have.

(Witness excused.)

Mr. Wilmer: If it please the court, I believe that counsel indicated this morning that the government has made substantial use of these transcripts in the preparation of the cause, and that the government [37] proposed to substantially rely upon the testimony of Mr. Stratton in the presentation of its case.

Mr. Holohan: That is a correct statement, counsel.

Mr. Wilmer: I will call Mr. Robert Sugden.

ROBERT V. H. SUGDEN

called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wilmer): State your name, please?

A. Robert V. H. Sugden.

Q. Bob, you are one of the defendants in these causes? A. Yes.

Q. In June of 1953, did you have occasion to contact anyone with respect to procuring a radio communication system for your use in Yuma?

A. Yes. I contacted Bud Bridges previous to June, and in June he came to my house to see me.

Q. Who is Bud Bridges?

A. Bud Bridges is the Motorola salesman and technician for this area.

Q. Did you at that time have any experience [38] or knowledge with respect to the Federal Communications law or regulations?

A. No.

Q. I presume that you are acquainted, as we all are, with the fact that Motorola is one of the outstanding electronics manufacturers and specialists in the country?

A. I investigated two or three other makes of——

Q. I say, were you aware at that time of their outstanding position in the field?

A. Yes. They are.

Q. Did he solicit your purchase of the equipment, and did you buy it?

(Testimony of Robert V. H. Sugden.)

A. Yes, I did give him an order for it at that time.

Q. What if anything was done with respect to procuring a license?

A. I asked him if we would have to take some examinations for licenses, and he said no, that he would take care of the licenses.

Q. Now, did you at that time make an application for a station license, or was an application made for a license for the station, Bob?

A. He said he would fill one out, and he had me sign the form, and he filled it out. [39]

Q. Did you sign the form in blank, or did you fill it out first?

A. It was the following week, we saw him here in Phoenix, and he typed it out at his residence, and we signed it, or I signed it.

Q. That was for the station license itself?

A. Yes, sir.

Q. Now, when was it you had this conversation with him respect to whether or not an operator's license was required?

A. That was the first time I talked to him, at Yuma.

Q. And he told you he would take care of it?

A. Yes, sir.

Q. That there was no examination required?

A. Yes, sir.

Q. Now, in the obtaining of this equipment and of the necessary operating authority, did you look

(Testimony of Robert V. H. Sugden.)

to anyone else other than Mr. Bridges for advice or help?

A. No, sir. He guided us on the thing.

Q. Then, Bob, after the station was equipped, or, rather, was set up and equipped, was Mr. Bridges there all through that time?

A. During the time it was being set up?

Q. Yes. Or did he come there from time to [40] time?

A. He came there periodically. He had other calls around the state, and he would stop in weekly and see us, and he came down shortly after the station, or after the equipment had gotten there and had been installed.

Q. Now, I believe your station license arrived at approximately August 26 of 1953, is that right?

A. Yes, sir.

Q. And after that time, after the license arrived, did Mr. Bridges come to Yuma?

A. He came down within a few days.

Q. Was there any conversation had at that time with respect to the necessity of your having an operator's license to operate?

A. He left us forms to fill in and send in to get the permit.

Q. Was there any conversation had, Bob? Did he make any statement to you that he forgot, or that it was necessary for you to have the operator's permit?

A. He said to send them in, fill them out and send them in.

(Testimony of Robert V. H. Sugden.)

Q. Now, at that time the license had arrived and the station was in operation? [41]

A. Yes, sir.

Q. Why did you continue, or why did you operate it, Bob, after the—I mean, prior to the time your permit arrived?

A. Well, we knew Bud was taking care of everything that was necessary, or presumed him to be, and at the time the station license came, there was another little paper came with it that had five or six statements on it, and one of them was that operators' licenses were held, or being obtained. I knew Bud would be by and straighten out the license deal, so we figured that it was all right.

Q. Well, he knew the station was in operation, did he? A. Yes, he did.

Q. He knew that you were operating it regularly at that time? A. Yes.

Q. Did he at any time advise you that you should not operate it until your permit got there?

A. No, I don't believe so.

Mr. Wilmer: That is all. Well, one other question. I think the F.C.C. gentleman cleared it up.

Q. (By Mr. Wilmer): You did send in the application, and it [42] came back, and you filled out some more information and sent it in, on your permit? A. Yes.

Mr. Wilmer: That is all.

(Testimony of Robert V. H. Sugden.)

Cross Examination

Mr. Holohan: I would like to have this marked Government's Exhibit 3 for identification.

(Said document was marked Government's Exhibit 3 for identification.)

Q. (By Mr. Holohan): I show you Government's Exhibit 1 in evidence, and ask you to look that over, and more particularly the signature on the reverse side? A. Yes?

Q. And with regard to the signature on Government's Exhibit 1 in evidence, can you tell whose signature that is?

A. That is my signature, sir.

Q. Is that the application for radio operator's license that you made to the F.C.C.?

A. It appears to be. I think it is.

Q. I will hand you Government's Exhibit 2 in evidence, and ask you, first of all, are you familiar with your wife's signature?

A. Yes, I am familiar with her signature.

Q. I will ask you to look on the reverse side [43] of Government's Exhibit 2 in evidence. Is that her signature? A. Yes, sir.

Q. Is that her application for a radio operator's license? A. I believe so.

Q. I will hand you Government's Exhibit 3 for identification and ask you to look that over and see if you recognize the photostatic copy parts there? A. Yes, sir.

Q. And do you recognize that?

A. I recognize the top half. I don't remember

(Testimony of Robert V. H. Sugden.)

the bottom half here offhand, but I see I signed it.

Q. That is your signature? A. Yes, sir.

Q. And what is that Government's Exhibit 3 for identification? What does that concern?

A. Well, this is the station license and construction permit.

Q. Now, I call your attention to the matter on the last photostatic page here of Government's Exhibit 3, under Remarks and Additional Data, that typewritten part there: "Applicant is engaged in the activities of general farming, land clearing, [44] insect control and cultivation. Two-way radio is proposed for use on farm vehicles, such as pickup trucks, tractors, and plows."

Are you familiar with that typewritten part?

A. Yes, sir. Mr. Bridges wrote that in.

Q. At anybody's direction?

A. No. Because he said he knew how to write it so that it would be in proper form.

Q. Is that what you were intending to use your station for?

A. Generally. But we don't put radios on plows. We laughed at that, but he sent it that way, anyway. We don't put radios on plows.

Q. That was generally what you wanted to use it for, was farming purposes?

A. Yes, sir.

Mr. Holohan: All right. We offer in evidence Government's Exhibit 3 for identification as Government's Exhibit 3, a photostatic copy from the records of the Federal Communications Commis-

(Testimony of Robert V. H. Sugden.)

sion of the application of the defendant for a station license.

Mr. Wilmer: Other than as to its materiality, we have no objection.

The Court: It may be admitted. [45]

The Clerk: Government's Exhibit 3 in evidence.

(Said document was received in evidence and marked Government's Exhibit 3.)

Q. (By Mr. Holohan): Do you recall, without looking at that paper, Government's Exhibit 3 in evidence, what date the station was licensed?

A. Yes, sir. It was licensed on the 27th.

Q. I see. Now, when were you licensed as an operator?

A. My permit came back for the 17th.

Q. For the 17th? A. Right.

Q. And you and your wife submitted those on what date?

A. Shortly after we received the application forms from Mr. Bridges.

Q. Do you drive an automobile?

A. Yes, sir.

Q. Do you have a driver's license?

A. I have a state chauffeur's license, sir.

Q. Had you ever discussed this question of having a license with Mr. Stratton back there at the Federal Communications Commission?

A. No, sir. The first I was able to talk to Mr. Stratton was when he came to make a station [46] investigation.

Q. That was on the 18th, wasn't it?

(Testimony of Robert V. H. Sugden.)

A. That was on the 18th.

Q. Was there any discussion then about licensing?

A. Not so much discussion. He said, "I see you have only had your license a few days," and that was the only comment I heard about it.

Q. Did you make any comment with regard to something to the effect, "Well, we have been so busy I just haven't had time to get a license?"

A. We were busier than bird dogs, that is for sure. I don't remember any such thing.

Q. You just don't remember? A. No, sir.

Q. But while the radio station was there in the house—that was the main spot, wasn't it, in the house, and then in the mobile units? Wasn't that the way it was to go? A. Yes, sir.

Q. But while it was there, it was operated by you, or at least the mobile units, without a license?

A. The mobile units do not require the operator's license, I understand.

Q. To your knowledge, was the home base [47] operated without a license?

Mr. Wilmer: If it please the court, this witness was intended for the sole purpose of the question of the circumstances under which the operation was conducted, and counsel is now going beyond that.

The Court: I am sorry. Will you read the question.

(The last recorded question was read by the reporter.)

Mr. Wilmer: We believe, if it please the court,

(Testimony of Robert V. H. Sugden.)

the witness is intended as a witness on the question of the circumstances——

The Court: He might use it against him in some other case.

Mr. Wilmer: That is exactly what I have in mind, your Honor.

The Court: All right. He will not be required to answer.

Mr. Holohan: That is all I have. Thank you.

Mr. Wilmer: That is all.

(Witness excused.)

Mr. Wilmer: I call Jean S. Sugden. [48]

JEAN S. SUGDEN

called as a witness for the defendants, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wilmer): Your name is Jean S. Sugden? A. Yes, sir.

Q. And you are the wife of Bob Sugden, who just left the stand, and also one of the defendants? A. Yes.

Q. Jean, in June, or thereabouts, of 1953, do you recall when you and Bob decided to buy this radio, and the circumstances surrounding it?

A. Oh, yes.

Q. When you contacted Mr. Bridges, will you please tell us whether or not you relied completely upon him for information as to what you should do to put the station in operation legally?

(Testimony of Jean S. Sugden.)

A. Yes, sir. As far as I am concerned, I didn't go to him, but in every respect that I was concerned, I did, yes.

Q. Did he prepare the application for the station license? A. Yes.

Q. Did you ever discuss with him whether or not it was necessary that you have a permit to operate [49] it yourself?

A. I didn't. I heard my husband ask him.

Q. And when was that?

A. In June when he was in our home.

Q. Do you recall what the answer was?

A. Yes. He said—Well, I can't say his exact words, but at any rate he said, "Well, don't worry about it. We will take care of it when the time comes."

Q. Then after the station was installed and your license arrived, Jean, did you have a further talk or discussion with Mr. Bridges at that time?

A. Well, yes, several times.

Q. I mean with respect to an operator's license?

A. Oh, no, never, not until after the station license had come.

Q. And that was some time the last part of August? A. Yes, sir.

Q. Do you recall the circumstances surrounding that conversation?

A. Yes. It was in our home.

Q. And I believe this base station was in your home also, is that right? A. Yes. [50]

(Testimony of Jean S. Sugden.)

Q. And you took care of it along with your household duties, is that right? A. Yes.

Q. Would you tell us at best you can just what was said at that time?

A. Well, he said, "You should have some operators' licenses." And he said, "How many will you need"?

And we didn't understand him. And then he explained who would need them and who would not need them. So we told him how many forms we would need. And he said, "Get them right in." And that is all.

Q. That conversation was in your home where the central station was, is that right?

A. Yes.

Q. Was the station in operation at that time?

A. Yes.

Q. Were you using it while he was there?

A. I think so. I don't know exactly but I think it was in operation all the time.

Q. As for Mr. Bridges, you knew who he was and the company he represented, did you not?

A. Of course.

Q. Did you rely completely upon his advice as to what was required or needed to put your station in operation, in legal operation? [51]

A. We had no one else to rely upon, of course, at that time.

Q. Did he warn you or tell you at any time that the station should not be in operation, or you should not talk over it until your permit came?

(Testimony of Jean S. Sugden.)

A. He never told us not to.

Q. If he had, what would you have done?

A. Well, I don't do things against the law.

Q. You would have shut it down?

A. Of course.

Mr. Wilmer: That is all.

Cross Examination

Q. (By Mr. Holohan): Do you have a driver's license? A. Yes.

Q. I will hand you Government's Exhibit 2 in evidence, and ask you to look that over. I direct your attention more specifically to the signature on the reverse side. Is that yours? A. Yes.

Q. Now, I direct your attention also to one item, if I may, Mrs. Sugden, on the reverse side of Government's Exhibit 2, in Item 13, where appears the word Yes. Whose writing is that? A. Mine.

Q. Now, you have stated the Motorola representative [52] advised you people that he would take steps to help you, or perhaps even get the licenses for you?

A. He had gotten our first one. We just assumed he would help us all the way through, of course.

Q. And he asked you how many forms you would need for the application? A. Yes.

Q. When did you actually get licensed?

A. What license?

Q. With regard to an operator's license?

(Testimony of Jean S. Sugden.)

A. They came the 17th, I think. I believe so. At least it says 17 on it.

Q. Now, you say the radio was in operation while this man was on the scene. Do you know whether anybody was using it while he was there?

A. On that particular day?

Q. Yes.

A. I don't remember exactly that day, no.

Q. Now, what was your impression was the reason for applying for one of these licenses? It was actually to be a licensed operator, wasn't it?

A. He gave us the forms and said we had to have one, yes.

Q. He said you had to have a license to [53] operate?

A. No. He said we should have an operator's permit. I thing that is what it is called.

Q. What the actual technical term is, he said you should have an operator's permit, didn't he?

A. He gave us the forms and told us to fill them out, yes.

Q. And to your way of looking at that——

A. That is what he said.

Q. Then it was your impression that you needed a permit to operate the radio, then?

A. I didn't know whether we had to have one to operate or not. All I knew was you had to send the forms in.

Q. You are a graduate of Yuma High down there, aren't you?

A. No, sir, I am not. Des Moines, Iowa.

(Testimony of Jean S. Sugden.)

Q. That was the high school up there?

A. No. It is Roosevelt.

Q. It is called Roosevelt?

A. Roosevelt High School.

Q. In other words, you had a high school education? A. Yes, sir.

Mr. Holohan: No further questions.

Mr. Wilmer: That is all. [54]

(Witness excused.)

Mr. Wilmer: That is all we have to offer, your Honor.

The Court: We will have a brief recess.

(Recess.)

The Court: You may proceed.

Mr. Holohan: The government would like to introduce one witness, your Honor.

THEODORE KIELING

called as a witness by the Government, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Holohan): State your name for the record? A. Ted Kieling.

Q. Where do you reside, Mr. Kieling?

A. In Yuma, Arizona.

Q. Do you know the defendants in this case, Robert and Jean Sugden? A. I do.

Q. About how long have you known them?

A. Oh, since the last part of July, I guess.

Q. Of what year? A. 1953.

(Testimony of Theodore Kieling.)

Q. Now, what is your job? [55]

A. Technician for the Sheriff's office.

Q. Pardon?

A. Radio technician for the Sheriff's office.

Q. Now, did you ever go over to the Sugdens home in regard to radio work?

A. Yes, several times.

Q. Was that in your capacity as a peace officer or what? A. No, as a techician.

Q. Now, in the course of your examination of the radio, were you ever asked any questions concerning the procedures for licensing, and so forth?

A. No.

Q. Now, directing your attention to the month of September, 1953, around the 8th, were you at the Sugden's place? A. Yes, on the 8th.

Q. Pardon? A. On the 8th.

Q. And why were you there?

A. I was getting ready to go on my vacation, and I wanted to make their final frequency check and modulation checks for their base station, which was required by the Commission, and I went out and made their checks.

And the F.C.C. has a form which you have [56] to fill out on completion of an installation. Being as they didn't have their operator's permit, I didn't have them finish the form until when they received their operator's permit back, and told them to go ahead and send the form in.

Q. Now, was there any discussion of any re-

(Testimony of Theodore Kieling.)

quirement about an operator's permit and the operation of the radio?

A. Yes. I furnished them with the forms, and showed them how to fill them out, and told them when they got them back to sign their completion report and send it in.

Q. Was there any discussion about prohibition of operating the radio prior to getting the license?

A. Yes.

Q. And can you tell us about that?

A. That was way back in July I believe, or the first of August.

Q. And can you tell us the place, the time, and the circumstances?

A. It was on the telephone, and they wanted me to come out and hook up the base station. And I told them I couldn't hook it up because they didn't have their station license yet. And he wanted to use it, and I told him if he would hook it up to 110 and put the aerial on it, and if the milliammeter [57] didn't read over 200 milli-amps, it wouldn't hurt. If it was too much it would damage the tubes, but it wouldn't hurt it seriously.

Q. Was there ever any discussion about any prohibition about operating the station without an operator's license?

A. Yes, when I was there the 8th.

Q. And what was that?

A. That was when I gave them the forms and told them I couldn't fill out their completion report because they didn't have their operator's license. I

(Testimony of Theodore Kieling.)

told that to Mrs. Sugden. She was the only one there at the time. That was at the house.

Q. She was at the house?

A. She was at the house.

Mr. Holohan: That is all.

Cross Examination

Q. (By Mr. Wilmer): You told her you could not complete it because they didn't have their operator's license?

A. No, I couldn't complete it because they didn't have——

Q. I asked you what you said. You said you couldn't complete it because——

A. Because she hadn't received her operator's permit. [58]

Mr. Wilmer: That is all.

Mr. Holohan: That is all.

(Witness excused.)

Mr. Holohan: That is all we have, your Honor.

Mr. Wilmer: I wonder if we shouldn't do the balance of this in chambers, and see what the record should or should not be.

The Court: What difference does it make?

Mr. Wilmer: It is the defendants' position at this time, your Honor, that it affirmatively appears there is a serious conflict in the evidence, that from the inception, the evidence improperly obtained is so inseparably entwined with what may have otherwise been obtained, plus the statement that the use has been substantially made in the preparation of

the case, and that it is proposed substantially to use the transcripts in the case, that under the doctrine enunciated by our Supreme Court in the various cases we discussed this morning, that the indictment cannot stand, and we, therefore, move it be dismissed.

The Court: Counsel's very frank statement that he relied heavily upon the testimony of Mr. Stratton to prove his case I think clinches the matter.

There are only two things, three things, as I recall. Mr. Justice Frankfurter, in his language [59] in the Nardone case, says you must first prove unlawful intereception of a message. Here, of course, the question that confronts us is whether it was lawful or unlawful.

I have indicated I would hold it was unlawful.

Then you go on from there, and I think Mr. Justice Frankfurter said, "what was the tainted fruit from this tree," and, of course, the government can come forward and show that it can prove its case without this intercepted information. But I say now, counsel has stated that they would be required to rely upon the testimony of Mr. Stratton.

From now on it merely becomes a matter of mechanics, because I shall hold that the testimony should be, or the information gained from this source should be suppressed.

It is a question whether counsel wants to move for a dismissal of the indictment.

Mr. Holohan: I believe counsel for the defendant has moved for a dismissal.

The Court: Was that included in the motion to suppress?

Mr. Wilmer: There is a motion to dismiss, which has been filed, but it is not a part of this. It goes to the sufficiency of the indictment. [60]

The Court: The sufficiency of the indictment is the pleading, though.

Mr. Wilmer: That is correct. And there is no motion other than the oral motion which I just made, and I believe that motion may be entertained in open court, oral in form, and I intended what I said a moment ago as such a motion, based upon the court's statement, and based upon the evidence as it has been presented, upon the ground that the government cannot be permitted to go forward in an indictment where it is claimed that the forbidden fruit, if I may use that term, is that which has been consumed all along the way.

The Court: It is a matter that should be reviewed.

Mr. Holohan: The government has previously stated its position to the court on this, and our belief that the Federal Communications Commission can monitor, and that in view of that——

The Court: That is where the government and the court disagree.

Mr. Holohan: Disagree, yes.

The Court: I will enter an order, then, dismissing the indictments.

Mr. Holohan: That is with the present indictments? [61]

The Court: Yes. And I think, as we discussed

this morning, it is an appealable order. The government can have an appeal.

Mr. Wilmer: We will agree with that, if it will add anything to the jurisdiction, that it is an appealable order. We will not raise the point that it is not an appealable order.

The Court: You don't have to. The reviewing court will.

All right, that will be the order. [62]

[Endorsed]: Filed June 18, 1954.

[Endorsed]: No. 14405. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Robert V. H. Sugden and Jean S. Sugden, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed: June 28, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

U. S. District Court No. C-11555-Phx.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT V. H. SUGDEN, Defendant.

U. S. District Court No. C-11554-Phx.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROBERT V. H. SUGDEN and JEAN S. SUGDEN, Defendants.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes Now the United States of America, plaintiff and appellant herein, and states that the following points are relied upon in this appeal:

1. The District Court erred in ruling that the interception by Government agents of radio messages sent by defendants was unlawful.

2. The District Court erred in ordering that testimony and information gained by the Government from intercepted radio messages of defendants should be suppressed.

3. The District Court erred in ordering the Indictments dismissed.

The plaintiff and appellant, United States of America, designates the following record as material to this appeal:

1. Indictment in C-11554 and Counts 1, 6, 8, 12 and 16 of the Indictment in C-11555.
2. Defendants' motion to suppress evidence.
3. Reporter's transcript.
4. Government's Exhibits 1, 2 and 3.
5. Minute entries for C-11554 and C-11555 for the following dates: November 23, 1953, March 25, 1954, March 26, 1954, June 2, 1954 and June 9, 1954.
6. Notice of Appeal in C-11554 and C-11555 for April 23, 1954.
7. Order by District Court to suppress evidence and dismiss Indictments (C-11554 and C-11555).
8. Notice of Appeal (C-11554 and C-11555) for May 11, 1954.
9. Any order by this Court consolidating notices of appeal and/or consolidation of cases on appeal.
10. This designation.

Dated at Phoenix, Arizona, this 28th day of June, 1954.

JACK D. H. HAYS,
United States Attorney for the District of Arizona.

/s/ WILLIAM A. HOLOHAN,
Assistant United States Attorney for the District of Arizona—Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed June 30, 1954. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Causes No. C-11555 and C-11554.]

MOTION FOR CONSOLIDATION OF CASES FOR APPEAL

Comes Now the United States of America, plaintiff and appellant herein, and represents to the Court that the above-entitled cases were ordered consolidated for trial in the District Court, that evidence at a preliminary hearing was taken while the above cases were consolidated, that the trial court ordered both cases dismissed at the same time, that the legal questions presented by this appeal will be identical for both cases, that a separate appeal as to each case will involve an undue burden on the Court and a hardship and additional expense to the Government and defendants;

Now, Therefore, the United States of America moves the Court to order the above-captioned cases consolidated in this appeal for the purposes of printing, briefing, and oral arguments.

JACK D. H. HAYS,
U. S. Attorney for the District of Arizona

WILLIAM A. HOLOHAN,
Assistant U. S. Attorney

/s/ EVERETT L. GORDON,
Assistant U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN, Chief Judge
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges

Acknowledgment of Service attached.

[Endorsed]: Filed July 1, 1954. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause No. 11555.]

MOTION FOR CONSOLIDATION OF NOTICES OF APPEAL

Comes Now the United States of America, plaintiff and appellant herein, and represents to the Court that the United States of America by its attorneys filed notice of appeal with the Clerk of the United States District Court for the District of Arizona on the 23rd day of April 1954 giving notice of appeal from the entry of a minute order dismissing the indictment in this cause, and that thereafter on the 5th day of May, 1954 the United States District Court for the District of Arizona signed and filed a formal written order dismissing the indictment in this cause, and that thereafter on the 11th day of May, 1954 the United States of America by its attorneys filed a notice of appeal from the formal written order aforedescribed;

Now, Therefore, the United States of America moves the Court to order the consolidation of the two notices of appeal filed in this cause on the grounds that they pertain to the same matter and a separate appeal as to each notice would provide an undue burden upon the Court.

Respectfully submitted,

JACK D. H. HAYS,
U. S. Attorney for the District of Arizona
WILLIAM A. HOLOHAN,
Assistant U. S. Attorney
/s/ EVERETT L. GORDON,
Assistant U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN, Chief Judge
/s/ WM. HEALY,
/s/ HOMER T. BONE,
United States Circuit Judges

Acknowledgment of Service attached.

[Endorsed]: Filed July 1, 1954. Paul P. O'Brien, Clerk.

[fol. 87] In United States Court of Appeals for the Ninth Circuit

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Minute Entry of Argument and Submission—February 7, 1955 (Omitted in Printing)

[fol. 88] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—September 30, 1955

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 89] In United States Court of Appeals for the Ninth Circuit

No. 14,405

United States of America, Appellant,

vs.

Robert V. H. Sugden and Jean S. Sugden, Appellees

On Appeal from the United States District Court for the District of Arizona

Opinion—September 30, 1955

Before Stephens, Fee and Chambers, Circuit Judges

Chambers, Circuit Judge:

Robert V. H. Sugden is a cotton farmer farming in Arizona near Yuma. His wife Jean assists him in the op-

eration, at least as far as operating their farm radio station is concerned.

On October 7, 1953, Mr. and Mrs. Sugden were jointly indicated for conspiracy to violate the immigration laws. Also, Mr. Sugden alone was indicted for concealing and shielding illegal entrants into the United States from detection. The charges revolve around allegations of employing Mexican nationals, commonly called "wetbacks," on the Sugden farm. It is alleged that they took various steps to hide the illegal entrants and avoid being caught with them in their employ.

Consideration of the case will be shortened if, for the discussion of the case, it is assumed the Sugdens are guilty as charged. Of course, this may not be true at all.

The legally offensive events began in August, 1953, and seem to have culminated on September 18 of the same year.

In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before [fol. 90] trial, the government was materially aided by the fact that one Robert J. Stratton, an engineer from the Los Angeles office of the Federal Communications Commission, in early September had come into the Yuma area with monitoring devices. With an assistant, Stratton located the Sugden's short wave transmitter. He listened to their broadcast instructions to the overseers in the fields. Apparently some of the instructions involved secreting Mexican nationals, illegally entered, from detection by United States immigration officials. An office of the Immigration Service was located in the town of Yuma and its officers patrolled the area.

The legal requirements for a farmer to operate his own radio station for farming purposes are minimal. He must have a license for his stationary transmitting set and any base operator must have a license.[1] It seems none is required for the operator of the mobile end of the two way radio apparatus. See 47 C.F.R., Chap. I, Parts 11 and 13. Licensing is perfunctory. The licensees must not have been convicted of a felony, etc. Ordinarily the salesman who

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[1] Apparently such an operator gets a restricted radio telephone operator's permit.

sells the radio equipment to the farmer can handle the necessary paper work for the farmer to obtain his station's and operators' licenses. At all times when Stratton was monitoring, Sugden's station was licensed. But the operators' licenses of Mr. and Mrs. Sugden did not arrive or were not effective until September 17, 1953. They had failed to fill out some blank in their application for operators' licenses and so there was delay. The Sugdens make much of the fact they were honestly trying to get licenses before September 17. On this point, it must be said that they were either licensed or unlicensed. Their good intentions could not serve as a substitute for licensing.

Returning to the subject of Stratton's listening, it should be related that he overheard broadcasts of Mr. or Mrs. Sugden which concerned the matter of secreting the wetbacks on September 9, 10 and 18, 1953. Some of the broadcasts were recorded by Stratton. On others he made notes. The contents of all apparently were made available to the Immigration Service and the district attorney. Also, considerable use was made of the broadcast matter before the grand jury.

[fol. 91] At the threshold of trial on separate indictments which were consolidated for trial, the defendantes moved to suppress the evidence obtained from Stratton's monitoring of the Sugden broadcasts. A hearing was had inquiring into the circumstances of Stratton's activities and the involvement of his evidence in the case. Most of the facts elicited are summarized hereinabove. During the hearing the Sugdens' counsel said: "If it please the court, I believe that counsel indicated this morning that the government has made substantial use of these transcripts in the preparation of the cause, and that the government proposed to substantially rely upon the testimony of Mr. Stratton in the presentation of its case." And the prosecutor replied: "That is a correct statement, counsel."

The trial court was of the opinion that the government's activities in developing and prosecuting the case ran counter to 47 U.S.C.A. 605 and granted the motion to suppress. Also, the trial judge quashed the indictments. The government's concession, above quoted, was a factor in quashing of the indictments and suppressing the evidence.

Section 605, above mentioned, reads as follows:

"Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communica- [fol. 92] tion to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

The government must concede that if the facts were the same save that Stratton had tapped the Sugdens' telephone line and obtained the same information without the Sugdens' consent as he did by monitoring the air waves, then the trial court's rulings were correct. Weiss v. United States, 308 U. S. 321. But the government says listening on the air and wire tapping are different. Therefore, it appeals to this court. It thinks the fact that Stratton had a legal duty to listen in order to find illegal operations under the Federal Communications Act entitled him to turn the information over to other agencies of the government. Also, it is argued in the government's unusually excellent brief that picking up an air wave message and disseminating it as Stratton did is not an intereception, is legal and something that Stratton surely and maybe any citizen could do anyway.

Perhaps a few background matters should be disposed of first. It is well to note that the defendants do not contend there was a violation of the Fourth Amendment or the Fifth. This is for the reason that Olmstead v. United States, 277 U. S. 438, is assumed to be the law of the land still. Second, it is to be observed that Section 605 nowhere within its own corners is designated as a rule of evidence. It has [fol. 93] certain civil and criminal significance by virtue of other sections of the Federal Communications Act. 47 U.S.C.A. 153, et seq. It becomes, however, a rule of evidence for federal courts by judicial construction. Nardone v. United States, 302 U. S. 379. Further, Section 605 has applicability to intrastate messages as pointed out in Weiss v. United States, supra.

It seems implicit in the act that agents of the Federal Communications Commission can do some "spying" on the air waves, i.e., intercept.[2] The Commission is charged with enforcing the act. Except by listening, how can the

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[2] A good note on the meaning of "intereception" is to be found in 54 Michigan Law Review, 623 (February, 1955). Section 153 of the Act (47 U.S.C.A. 153) pinpoints the definition of wire communication as "between the points of origin and reception." The quoted words take on significance in the cases of recordings of telephone conversations and in the case of a person disclosed to only one con-

Commission tell with certainty that a station is using its assigned frequency?

The purpose of Section 605 is generally said to be to protect the "means"[3] of interstate communication. Goldman v. United States, 316 U. S. 129. At first look, it is difficult to see how a man with a farm radio has any privacy and how silencing him who hears conversations on the farm radio protects any privacy or the means of communication. However, the very limited privacy which Section 605 gives the user of radio for communication may tend to encourage the dispatch of messages via radio over and above the use that would be made of the means if personal messages were part of the public domain available tomorrow, for example, for the commercial purveyor of gossip.

While the telephone does have more privacy than private radio, yet we think that the government agent who moni- [fol. 94] tors cannot make use of the fruits of his monitoring if he finds the station legally on the air and the persons using the station legally authorized to operate it. That is, he can listen for the purpose of enforcing the act and make such use of the information as tends to enforce the act.

Weeks v. United States, 232 U. S. 383, and the two cases of Nardone v. United States, 302 U. S. 379 and 308 U. S. 338, announce rules of evidence which it is assumed Congress may change.

We think here that unless the Congress orders otherwise, the exclusionary rules of Weiss and Goldman, supra, are to be applied to listening in (at least at a point away from the sender and receiver and without the consent of either) on non-public broadcasts by both private individuals and

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verser who listens on an extension line or sits beside a party to the conversation and overhears. Such cases are collected in Flanders v. United States, 6 Cir. 222 F.2d 163.

The same Section 153, defining "radio communication," does not mention the elements of points of origin and reception.

In this court's view on radio, except as to a public broadcast anyone who listens intercepts if he is not a party to the communications or is not with a party.

[3] Herein, we consider the "means" as licensed stations manned by licensed operators.

all public officers save in connection with the Federal Communications Commission's necessary policing for violation of the act. And in connection with such policing, information can be used no further than to effect the policy of the act by criminal prosecution thereunder or by use of other appropriate procedures.

The theory of conduct of the officers in the field in the instant case (although it is said that the Immigration Service did not have the equipment to listen to Sugden's radio) seems to have been, "The Federal Communications Commission can legally listen. So we shall use their ears for what we, the Immigration Service, cannot do." In view of Section 605, we think that if Congress wants the Federal Communications Commission to go into the general crime detection business it should say so. If it wants to authorize the Immigration Service to listen,[4] we assume it may do so. We shall not put either agency there by judicial construction.

Here in Sugden's case a special situation exists as to all of his and Mrs. Sugden's broadcasts save one day's. Although the station was licensed, the two Sugdens were not licensed operators until September 17th. Therefore, they were not legally using the station before September 17th. To throw a mantle of protection provided by Section 605 over an outlaw broadcast is to abandon reason. Therefore, we hold [fol. 95] that as to private radio communications, before any right of privacy exists under Section 605 the voice must be legally on the air; otherwise one who hears, and especially the Federal Communications Commission, may make full disclosure. Giving the one who broadcasts without authority any protection under Section 605 could not tend to protect the means of communication.

Even though divulgence of the content of unlicensed broadcasts is not prohibited by Section 605, there was no attempt in the hearing before the trial court to distinguish between the use made of messages intercepted before September 17th and what was heard thereafter.

It is this court's view that the trial court should reexamine the motions of defendants on the basis that free use of any

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[4] That is, listen and divulge.

radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment. And possibly the court may want to exercise its power to open up the proceedings of the grand jury before it rules on dismissing the indictments.[5] The last-mentioned matter will involve the use of a wise discretion, depending on how the hearing otherwise develops.

Prima facie, the general thesis this court adopts may seem absurd. It may be said that with radio he who broadcasts, in the very nature of things, has no privacy. It may be said that shutting the government's mouth if it listens to the radio in no way protects the means of communication, that is, the instrumentality which is said to be the object of Section 605. If such be true and the end result be not desirable, then the appeal should be made to the Congress. Too much case law already has been built up in the telephone cases for this court to act as a free agent now.

The orders dismissing the causes and suppressing evidence are reversed for proceedings not inconsistent with this opinion.

[fol. 96] In United States Court of Appeals for the Ninth Circuit

No. 14,405

United States of America, Appellant,

vs.

Robert V. H. Sugden and Jean S. Sugden, Appellees

Judgment—Filed and Entered September 30, 1955

Appeal from the United States District Court for the District of Arizona

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

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[5] This court is without knowledge of whether or not grand jury proceedings are stenographically reported in the District of Arizona.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Orders of the said District Court dismissing the causes and suppressing evidence, be, and hereby are reversed, and that this cause be, and hereby is remanded to the said District Court for proceedings not inconsistent with the opinion of this Court.

[File endorsement omitted.]

[fol. 97] In United States Court of Appeals for the Ninth Circuit

No. 14,405

United States of America, Appellant,

vs.

Robert V. H. Sugden and Jean S. Sugden, Appellees

Order Modifying Opinion—Filed November 10, 1955

Before Stephens, Fee and Chambers, Circuit Judges

The opinion filed herein on September 30, 1955, is modified as follows:

(1) The last sentence in the first full paragraph on Page 5 of the printed opinion is modified by striking therefrom the last sentence which reads as follows:

> "The Commission must police for profanity, which is proscribed by the act."

This sentence is eliminated for the reason that it is unnecessary for the decision of the case.

(2) After the word "indictments" in the third sentence of the second paragraph on Page 7 of the printed opinion footnote "5" is added to read as follows:

> "5. This court is without knowledge of whether or not grand jury proceedings are stenographically reported in the District of Arizona."

(S.) Albert Lee Stephens, James Alger Fee, Richard H. Chambers, Circuit Judges.

[File endorsement omitted.]

[fol. 98] In United States Court of Appeals for the Ninth Circuit

Before Stephens, Fee and Chambers, Circuit Judges

Minute Entry of Order Denying Petition for Rehearing —November 10, 1955

On consideration thereof, and by direction of the Court, it is ordered that the petition of Appellees, filed October 26, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

[fol. 99] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 100] Supreme Court of the United States, October Term, 1955

No. 555

[Title omitted]

Order Allowing Certiorari—Filed January 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DEC 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 555

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel for Petitioners

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Yuma, Arizona

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IN THE

Supreme Court of the United States

October Term, 1955

No._____

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert V. H. Sugden and Jean S. Sugden, husband and wife, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 30, 1955.

OPINION BELOW

The opinion of the Court of Appeals, (*infra*, Appendix A, pp. 19-26) is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered September 30, 1955. A petition for rehearing was denied on November 10,

1955, (*infra*, Appendix B and C, pp. 27-29) The jurisdiction o this court is invoked under the provisions of 28 U.S.C.A. Sec 1254 (1).

QUESTIONS PRESENTED

1. Whether the unintentional failure by the operator of a farm radio-transmitting station to obtain a "perfunctory" permit as such operator frees the communications so made from the protection of Section 605, 47 U.S.C.A. and in legal effect authorizes agents of the Federal Communications Commission to "wire tap" such communications at the behest of the Department of Justice in aid of an investigation then under way of suspected criminal activity on the part of such operator unrelated to the communications field and renders communications so intercepted admissible in a Federal Court as evidence against such operator.

2. Whether, it appearing without conflict in the evidence that Federal Communications Commission agents had "wire tapped" farm radio communications of petitioners in aid of a criminal investigation not related to the communications field at a time when both station and petitioners were properly licensed and also at times before petitioners had received their applied-for operators' permits and such intercepted communications were indiscriminately used by the Government before the Grand Jury which indicted petitioners and in trial preparation, the trial judge committed error in suppressing the evidence so obtained and used and dismissing the indictment when the Government made no offer or effort (a) to disprove that the evidence concededly illegally obtained (by the Court of Appeals) played a substantial part in causing the Grand Jury to indict; (b) to disprove that such evidence so obtained was a substantial factor in the trial preparation of the Government, or (c) to convince the trial court that such illegally intercepted evidence would not be used on the trial of the action and that evidence, free from the taint of illegality was at the disposal of the Government to prove its case.

3. Whether agents of the Federal Communications Commission are authorized to "wire tap," i.e., intercept and listen to radio communications transmitted by a private radio installation without limitation, for the purpose of determining if (a) the radio apparatus is being used for the purpose for which it has been licensed by the Federal Communications Commission, or (b) if the radio is being used to broadcast profanity or obscenity or for an unlawful purpose or a purpose for which the equipment is unlicensed and whether, having so listened in on private communications, the evidence so obtained may be employed in a Federal Court by the Government before the Grand Jury in securing indictments, in developing witnesses in building its case and as evidence on the actual trial of the case so developed.

STATUTES AND REGULATIONS INVOLVED

Sections 303, 312, 326, 501, 605, Title 47 U.S.C.A.

Chapter 71, Title 18, Sec. 1461, U.S.C.A.

Section 259a, Chapter 6, Title 39, 1954 Cum. Pocket Part Set forth verbatim in Appendix D, pp 29-40.

STATEMENT

The basic facts are:

Petitioner, Robert V. H. Sugden, prior to June of 1953, contacted one Bud Bridges, technician and salesman for Motorola in the Yuma, Arizona, area, with respect to purchasing a two-way radio transmitting apparatus for use on farm vehicles such as pickup trucks, with the result such an apparatus was purchased from Motorola. Petitioners knew of the outstanding position of Motorola in the radio and electronics field, knew nothing of Federal Communications Commission law or regulations and depended entirely upon Bridges for technical advice. He completed their station license application and such license issued August 26,

1953. Bridges told petitioners operators' permits would be necessary, that no examination was required and that he, Bridges, would take care of securing them. A paper accompanied the station license which contained, among other statements, one to the effect that operators' permits were held, or were being obtained—and petitioners assumed Bridges was taking care of the matter.

After the station license arrived Bridges left some forms, told petitioners to fill them out and send them in. *The station was then in operation and Bridges did not warn petitioners such use was illegal until their permits arrived.* Petitioners completed the forms and sent them in September 9th, but due to their failure to complete the forms properly they were returned for completion with the result their actual permits were in the hands of petitioners September 17th.

The technician for the Yuma County Sheriff, Kieling, who acted as technician for the installation of the unit, testified he made a final check of the station September 8th and told petitioners to finish the completion form when they got their permits and send it in. He further testified he told Robert Sugden in July he could not hook up the *station* because he did not have his *station* license but did tell him how to hook it up himself. The most this witness told petitioners was that he could not fill out their completion report as they did not have their operators' permits. *He at no time warned petitioners not to operate the station until the permits arrived* and the station was openly in operation.

These operators' permits issue as a matter of course without examination if the applicant indicates American citizenship, no felony history and familiarity with the regulations of the Federal Communications Commission. In fact, the Commission can waive issuance of these permits if it finds such to be in the public interest. (Section 318)

The station operated between its location in the Sugden home where Mrs. Sugden operated it along with taking care of her

household duties, and mobile units in trucks with the operators of the trucks talking back and forth with the operator in the Sugden home. No operators' permits are required of the person using the unit in the truck to talk with the central station.

On September 4, 1953, Robert J. Stratton, assistant engineer in charge of the Eleventh District Office of the Federal Communications Commission with headquarters in Los Angeles, came to Yuma, Arizona, with equipment designed to intercept and listen to radio communications on direction of the Washington office of the Federal Communications Commission to make an investigation of petitioners' activities by reason of a complaint by the Department of Justice, which in turn was based upon a complaint by the Immigration Service. He contacted the Immigration Service upon arrival and proceeded to listen in on petitioners' conversations by radio. As to petitioner Robert V. H. Sudgen, all of his conversations at all times were lawfully carried on, since he did not operate the central station and no permits were required of the persons using the mobile unit (unless it be contended as to the conspiracy indictment that the acts of Jean S. Sugden in transmitting signals without a permit was also the act of Robert as a claimed co-conspirator. It is suggested the failure to seasonably obtain a permit was not an act in furtherance of the claimed conspiracy and played no part therein and hence such omission being unrelated to the conspiracy would not bring Robert within the familiar rule.)

Stratton made notes of this first interception, which were promptly turned over to the Immigration Service. Stratton returned with a partner on the 10th of September and again on the 18th of September upon which two occasions the intercepted conversations were transcribed and copies of such transcriptions promptly turned over to the Immigration Service.

Stratton testified before the Grand Jury as to the substance of each conversation so intercepted and copies were made available to the United States Attorney who used them in confronting and

questioning employees of petitioners, some of whom also testified before the Grand Jury which returned the indictments here involved accusing petitioners jointly substantially of conspiracy (with various of their employees not charged) to conceal and shield from detection aliens illegally in the United States through the use of radio equipment used to warn the various co-conspirators that Immigration officers were on their way to various cotton fields so that such co-conspirators could drive to the field and warn the "wetbacks" to hide. Various overt acts, not here material, were alleged. Petitioner Robert V. H. Sugden was also accused of shielding and concealing certain named aliens illegally. The two indictments were consolidated for trial by stipulation.

Petitioners seasonably moved to suppress all evidence gained by the Government through these "wire tap" operations, which motion was heard prior to trial, upon which hearing the facts as above set forth appeared. It also appearing on the hearing that this evidence illegally gained was employed by the Government in securing the Grand Jury indictments, petitioners moved orally in open court to dismiss the indictments, which motions were granted by the trial judge.

The Court of Appeals reversed holding that the transcription of September 18th, after the operators' permits were issued, was illegally made, but that the failure of petitioners to hold operators' permits during the September 4th and 10th interceptions put them beyond the protection of the law and declared public policy forbidding "wire tapping" and rendered this evidence available to the Government. The court suggested that a new hearing be held to separate out the bad from the good with the trial court giving consideration to opening up the proceedings before the Grand Jury to determine how much the minds of the Grand Jurors were swayed by the "tainted" fruit.

Petition for Rehearing was denied November 10, 1955.

REASONS FOR GRANTING THE WRIT

1. The ruling below sanctions (and requires acceptance and approval by the trial court) of conduct by federal officers and the Department of Justice in defiance of declared public policy (both by the Congress and this Court) "through resort to methods deemed inconsistent with ethical standards and destructive of personal liberty" by a practice "* * * which involves a grave wrong." *Nardone vs. U. S.*, 82 L. ed. 314, 317, 58 S. Ct. 275, 302 U. S. 379.

2. The Circuit Court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; first, the extent to which and when Federal Communications Commission agents can listen in on radio conversations and thereafter divulge the information so obtained; secondly, if the distinction drawn by the Court of Appeals as to the effect of no operators' permits is valid, what is the proper proceeding to be followed by the court when it appears illegal evidence has been used by the Government indiscriminately with legal evidence and the Government makes no effort to show how much the illegal evidence influenced the indictment and aided in trial preparation.

3. The ruling of the Circuit Court is in conflict with the apparent ruling of the Supreme Court in *Nardone vs. U. S.*, supra.

4. The ruling of the Circuit Court for the Ninth Circuit is in conflict with the rulings of the Circuit Court for the Second Circuit in *U. S. vs. Coplon*, 185 F. 2d 629, certiorari denied, 72 S. Ct. 362, 342 U. S. 920, 16 L. ed. 690, as to the proper procedure under the circumstances disclosed herein, Point 2, supra.

POINT 1.

The Circuit Court has weighed in the scales of justice the innocent and unintentional failure of Jean S. Sugden in justifiable reliance upon the Motorola representative to wait for the arrival

of her applied-for "perfunctory" permit (to employ the characterization of these permits by the Circuit Court) before she opened the switch and spoke into the transmitter, against conduct which this Court has condemned as contrary to public policy and inconsistent with ethical standards, which course of conduct was purposely entered into by federal officers, and has adjudged that an innocent technical oversight outweighs a purposeful ignoring of the law.

Section 501 of the Communications Act makes criminal failure to hold an operator's permit when operating radio equipment (among other things) only when such omission is wilful and knowing. "Any person who wilfully and knowingly does or causes to be done any act * * * in this chapter prohibited * * * or who wilfully and knowingly omits or fails to do any act * * * in this chapter required * * * shall, upon conviction thereof * * * be punished for such offense * * * by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both * * *."

By no construction of the evidence can the omission of petitioners to hold permits be considered other than inadvertent and pure ignorance. No improper purpose can be ascribed to their conduct for the omission served no purpose as advancing their claimed criminal purpose; the use was open and in reliance upon one (Bud Bridges) upon whom they were entitled to rely. Indeed there accompanied the station license from the Federal Communications Commission "another little paper * * * that had five or six statements on it, and one of them was that operators' licenses were held *or being obtained.*" Certainly if their acts were unlawful petitioners might have expected Bridges to warn them to that effect and the technician, Keiling, who, while acting as a technician, was associated with the sheriff's office merely told petitioners he could not complete the completion form since their permits had not arrived. Unless the record supports a finding of criminal purpose in the omission relied upon,

plainly the Court of Appeals attached an improper significance to the omission.

Even the most biased mind could not find evidence or inferences therefrom to even hint at such a purpose.

In contrast to this type of inadvertent omission, the purpose of Stratton in going to Yuma and of his superiors in sending him there, was not to discover if petitioners had operators' permits—their own records would have disclosed that—and, in fact, *in the course of the "wire tapping" procedures on the part of Stratton the operators' permits were in fact issued to petitioners;* his purpose was to "wire tap" petitioners' conversations regardless of whether the station was licensed or petitioners held operators' permits.

These federal officers knew that this Court in *Weiss vs. U. S.*, 308 U. S. 321, 84 L. ed. 298, 60 S. Ct. 269, had declared the prohibitions of Section 605 (47 U.S.C.A. 605) applied to intra-state communications and that the permissible course of conduct of federal law enforcement agencies in relation to Section 605 was declared by this Court in *Nardone vs. U. S.*, supra.

The history of Section 605 warranted no conclusion that radio communications were, somehow, by reason of their peculiar susceptibility to interception, intended to be exempted from the provisions of Section 605, for Section 605 was originally a part of the statutory regulation of radio and was not extended to cover and protect telegraphed and telephoned messages until the creation of the Federal Communications Commission and the consolidation of supervision over radio, telephone and telegraph in the Federal Communications Commission. *Nardone vs. U. S.*, supra.

Even a casual reading of Section 605 warrants no conclusion that the Congress intended to exempt agents of the Federal Communications Commission (as distinguished from other federal law enforcement agencies) from its provisions. The proviso clause

exempts certain definite communications—none other—and it is well-established that a proviso in normal usage *makes the general enacting clause of a statute to which it is attached applicable to everything subject thereto* and not exempted by the proviso.

George Moore Ice Cream Co. vs. Rose, 289 U. S. 373, 53 S. Ct. 522, 77 L. ed. 1265.

McDonald vs. U. S., 279 U. S. 12, 49 S. Ct. 218, 73 L. ed. 582.

White vs. U. S., 191 U. S. 545, 24 S. Ct. 171, 48 L. ed. 295.

There is nothing in the statute which confers its powers upon the Federal Communications Commission which even hints at such activity upon its part. Section 303 of Title 47 indicates no purpose on the part of the Congress to create a super police agency within our land with a lawful "ear" at the "keyhole" of every operator of a radio transmitter so long as the ear be placed there under the guise of listening for obscenity or profanity, to determine if the station is operating within its license or to detect some unlawful activity.

The logical result of such a conclusion as suggested by the Court of Appeals must be that the agents of the Commission may at all times lawfully listen in on radio conversations to determine if the station is operating lawfully and for a lawful purpose. Logically, therefore, under the familiar rule that evidence come upon by federal officers acting lawfully can be employed in Federal Courts even though under other circumstances it would be denied admissibility (*Marron vs. U. S.,* 72 L. ed. 231, 48 S. Ct. 74, 275 U. S. 192 (annotated 72 L. ed. 231)) it follows that *all* intercepted communications may be disclosed. If it be contended that only such interceptions may be disclosed as evidence profanity, obscenity, unlawful conduct, or operation of the station in violation of the license, we then have the rather unusual situation arising of the legality of the officer's act depending upon whether he thereby chances upon some wrongful

conduct which in turn relates back and purifies an act which but for such windfall (to the officer) would have been wrongful and illegal.

Of course Section 605 prohibits interception *and* disclosure so it may be contended that interception is freely permitted and it is only wrongful when disclosure follows interception. Such is not the intent of Section 605. The prohibition is against *both* interception and divulgence. Plainly a communication could not be divulged unless it has been first intercepted by someone. If the Congress had intended that the divulgence only was to be prohibited it would have been very simple for it to have said so. But it did not do so, for it followed up the prohibition against interception *and* divulgence with a prohibition aimed *solely* against divulging communications wrongfully intercepted with knowledge of such wrongful interception. Finally, such a construction would put a lawful "peeping Tom" at the window of every private station privileged to privately enjoy such a violation of the right of privacy, enjoined only to satisfy the lust of such viewer privately.

Section 303(m), which details the causes for which the Commission may revoke a permit, contains no language to indicate the Congress contemplated agents of the Commission would censor or monitor communications for the purpose of determining if some crime might be in the making. The Congress specified six general causes for which a license of an operator might be suspended:

1. Violation of any Act, treaty or convention binding on the United States which the Commission is authorized to administer or any regulation made by the Commission under any such Act, treaty or convention;

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2. Failure to carry out a lawful order of the master lawfully in charge of the ship or aircraft whereon the licensee is employed;

3. Willfully damaging or permitting radio apparatus o installations to be damaged;

4. Transmitting superfluous radio communications or com munications containing profane or obscene words or language or knowingly transmitting false or deceptive signals or communi cations or a call signal or letter not assigned to the station being operated;

5. Wilful or malicious interference with any other radio communications or signals; and

6. Obtaining or attempting to obtain or assisting another in obtaining or attempting to obtain operator's license by fraud.

It is significant that subdivision 1 above does not extend the power of the Commission to revoke an operator's license for violation of any law but only for violation of any Act, treaty or convention binding upon the United States which the Commission is authorized to administer or for violation of any regulation made by the Commission under any *such* Act, treaty or convention. The use of the word "such" in connection with regulations made by the Commission clearly relates back to limit the word "Act" to such Acts as the Commission is authorized to administer.

Certainly had the Congress contemplated that the Federal Communications Commission was to serve as an arm of the Department of Justice in enforcing our criminal statutes, here would have been the place to authorize it to suspend or revoke the license if the operator thereof was using the same in furtherance of some criminal scheme or conspiracy.

We respectfully urge the Court of Appeals has overlooked the basic underlying principle which condemns a practice such as here indulged in by the Government; has overlooked the fact that *a mere technical non-criminal omission of these petitioners cannot make something morally right which in its very essence is*

morally wrong; cannot make something lawful which in its very nature is abhorrent to law and decency.

The Court of Appeals concludes:

"It seems implicit in the Act that agents of the Federal Communications Commission can do some 'spying' on the air waves, i.e., intercept * * *"

Nowhere can we find any authority in the Commission spelled out directly or indirectly to spy for anything. Indeed, the prohibition against use of indecent language has been lifted out of the Act and transferred to Title 18, Chapter 71, Section 1464. Nowhere is there any indication that obscenity by radio communication is to be policed in any fashion different than obscenity by mailing obscene matter condemned by Section 1461, Chapter 71, Title 18, U.S.C.A.

By like course of reasoning, does the Post Office Department have the right to "sample" private mailings to see if perchance some illegal activity is to be found thereby; to do some "spying" to ascertain if non-mailable matter is being transported in violation of the express prohibitions of Section 259a, Chapter 6, Title 39 U.S.C.A.? By the same line of reasoning as the Court of Appeals applied to radio communication, we reach the unhappy conclusion that our postmaster or letter carrier has carte blanche to open and read our most private correspondence on a "night ride" for obscenity or crime-inciting matter in the mails. True it is that Section 303(d) authorizes the Commission to revoke the operator's license of one transmitting obscene words but so does Section 259a, Chapter 6, Title 39, U.S.C.A. (1954 Cum. Pocket Part) authorize the Postmaster to exclude from the mails obscene solicitation matter, and Section 1461, Title 18 requires that non-mailable obscene matter "shall not be conveyed in the mails or delivered from any post office *or by any letter carrier.*" (Emphasis supplied)

The purpose of the "wire tapping" was not to ascertain if a unlicensed station was operating or if unlicensed operators were transmitting or if an unassigned frequency was being employed the purpose was to (in cooperation with the Department of Justice and in direct defiance of said Section 605) intercept and divulge communications *without reference to or regard for* whether the station or the operators were licensed or unlicensed. Indeed, in the course of the "wire tapping" procedures operators' licenses were issued to petitioners, so plainly the Federal Communications Commission and its officials were not concerned with this phase of petitioners' activities.

Weighing then in the balance of propriety the simple oversight of the petitioners to obtain a "perfunctory" permit against the purposeful, deliberate disregard of a statute of the United States and the denunciations by this Court of "dirty business" in law enforcement, can it be said the trial court should have countenanced such conduct?

This is not evidence stumbled upon in the course of a lawful discharge of duties imposed by law upon the Federal Communications Commission; *this is evidence purposefully sought out in direct defiance of law.* Would it be said that because one operating an unlicensed motor vehicle upon the highway without an operator's license thereby becomes subject to unlawful search and seizure because he is unlawfully upon the highway and has no right to be driving the vehicle? Would the Government contend the police authorities might arbitrarily stop all motorists and search their vehicles with the legality of such action turning upon the chance of the presence or absence of a driver's license in each instance?

We respectfully urge that the technical and innocent oversight of petitioners in failing to properly fill out a form for a "perfunctory" permit does not make them "outlaws of the ether highways," shorn of all the rights of a citizen of the United States, to be "shot on sight" by Federal Communications Commission agents

stalking them, not as unlicensed operators of communications equipment and for that delinquency, but in cooperation with the Department of Justice and the Immigration Service for the claimed offense of concealing aliens—a matter generally accepted as somewhat beyond the jurisdiction of the Federal Communications Commission.

POINTS 2, 3 and 4

These three points can be considered together to avoid repetition. Should the conclusion reached by the Courts of Appeals as to the effect of the failure of Jean S. Sugden to hold an operator's license be found unsound, then a consideration of these points becomes unnecessary.

There is no argument but that, tested by the judgment of the Court of Appeals, Stratton unlawfully intercepted the conversations of September 18th. The station was licensed; both petitioners then had their permits.

There is no conflict in the evidence that petitioner Robert V. H. Sugden did not operate the central station; his use was in the field on the mobile end of the equipment installation where a permit was not required and the station used was at all times fully licensed.

There is no conflict in the evidence as to the fact that Stratton related this conversation of September 18th to the Grand Jury, a transcription thereof was supplied to the Immigration Service and the United States Attorney and was used in interrogating witnesses, as the Court of Appeals says:

> "In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before trial, the government was materially aided by the fact one Robert J. Stratton * * * had come into the Yuma area with monitoring devices."

and that the Government proposed to use the various transcriptions on the trial of the cause.

Petitioners seasonably moved to suppress all of these transcriptions and related evidence.

Petitioners, pursuant to the rule laid down by this Court in *Nardone vs. U. S.*, supra, as interpreted by the Second Circuit in *the Coplon case*, supra, clearly established that substantial evidence condemned as illicitly obtained by the test as to illegality established by the Court of Appeals in its opinion, was employed by the Government before the Grand Jury in securing the indictments quashed by the District Judge and in preparing its case against petitioners; and further, that it would use such evidence on the trial of the cause. These facts appearing to the satisfaction of the District Judge, we respectfully urge the burden fell upon the Government to satisfy the District Judge:

(a) That the indictments were untainted by the use of such unlawful evidence;

(b) That such evidence, so unlawfully obtained, did not play any substantial part in building the Government's case, directly or indirectly;

(c) That the evidence which the Government proposed to offer on the trial of the cause was obtained from independent sources untainted by and not traceable to such unlawful interception and divulgence.

Accepting for the purpose of this argument the distinction drawn by the Court of Appeals between communications sent by an unlicensed operator and a licensed operator, it is clear that there were two recordings made by Stratton, one when the operator's permit was in effect, one when such permits were only applied for. *The Government knew which of these transcriptions it had employed in building its case and in obtaining these indictments. It knew which of these it proposed to use on the trial of the action. These petitioners were not so advised.*

Overt Act No. 5 of the Indictment for conspiracy charges the September 18th use of the radio as an act in furtherance of the conspiracy so conclusively the transcription of this date was presented to the Grand Jury. Count 18 of the Indictment of Robert Sugden is apparently likewise based upon this transcription.

The rule which the Court of Appeals has declared as to the effect of the lack of a proper license had been theretofore declared in the Ninth Circuit in *Casey vs. U. S.*, 191 F. 2d 1, and was known to the Government.

Yet the Government made no effort or offer to show that the indictments were untainted by this unlawful evidence or that it could proceed with lawful evidence arising from a lawful source.

Stratton testified that he did in fact relate the entire interception procedure to the Grand Jury:

"A. Well my testimony was a running account of what had happened from the time we were first called in on the case." (T. R. 40)

* * * * * * * * * *

"Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

"A. That is correct, the general use of the radio in that particular case." (T. R. 41)

How could the District Judge remove this taint from the indictment; how could he ascertain what effect the unlawful testimony had upon the minds of the Grand Jurors?

Clearly as to the petitioner Robert V. H. Sugden *all* interceptions were unlawful, since he at no time was acting as operator

of the station, so under any interpretation of the facts and law—unless the Federal Communications Commission is free to "spy" as it chooses—the action of the trial judge was correct.

CONCLUSION

The ruling below violates the spirit and intent of Section 605 and is at variance with procedure indicated by this Court as interpreted by the Second Circuit. We respectfully petition therefore that the writ herein prayed for issue.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

United States of America, *Appellant,* vs. Robert V. H. Sugden and Jean S. Sugden, *Appellees.*	No. 14,405 Sept. 30, 1955

On Appeal from the United States District Court for the District of Arizona.

Before: STEPHENS, FEE AND CHAMBERS, Circuit Judges.
CHAMBERS, Circuit Judge:

Robert V. H. Sugden is a cotton farmer farming in Arizona near Yuma. His wife Jean assists him in the operation, at least as far as operating their farm radio station is concerned.

On October 7, 1953, Mr. and Mrs. Sugden were jointly indicted for conspiracy to violate the immigration laws. Also, Mr. Sugden alone was indicted for concealing and shielding illegal entrants into the United States from detection. The charges revolve around allegations of employing Mexican nationals, commonly called "wetbacks," on the Sugden farm. It is alleged that they took various steps to hide the illegal entrants and avoid being caught with them in their employ.

Consideration of the case will be shortened if, for the discussion of the case, it is assumed the Sugdens are guilty as charged. Of course, this may not be true at all.

The legally offensive events began in August, 1953, and seem to have culminated on September 18 of the same year.

In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before trial, the government was materially aided by the fact that one Robert J. Stratton, an engineer from the Los Angeles office of the Federal Communications Commission, in early September had come into the Yuma area with monitoring devices. With an assistant, Stratton located the Sugdens' short wave transmitter. He listened to their broadcast instructions to the overseers in the fields. Apparently some of the instructions involved secreting Mexican nationals, illegally entered, from detection by United States immigration officials. An office of the Immigration Service was located in the town of Yuma and its officers patrolled the area.

The legal requirements for a farmer to operate his own radio station for farming purposes are minimal. He must have a license for his stationary transmitting set and any base operator must have a license.[1] It seems none is required for the operator of the mobile end of the two way radio apparatus. See 47 C.F.R., Chap. I, Parts 11 and 13. Licensing is perfunctory. The licensees must not have been convicted of a felony, etc. Ordinarily the salesman who sells the radio equipment to the farmer can handle the necessary paper work for the farmer to obtain his station's and operators' licenses. At all times when Stratton was monitoring, Sugden's station was licensed. But the operators' licenses of Mr. and Mrs. Sugden did not arrive or were not effective until September 17, 1953. They had failed to fill out some blank in their application for operators' licenses and so there was delay. The Sugdens make much of the fact they were honestly trying to get licenses before September 17. On this point, it must be said that they were either licensed or unlicensed. Their good intentions could not serve as a substitute for licensing.

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[1]Apparently such an operator gets a restricted radio telephone operator's permit.

Returning to the subject of Stratton's listening, it should be related that he overheard broadcasts of Mr. and Mrs. Sugden which concerned the matter of secreting the wetbacks on September 9, 10 and 18, 1953. Some of the broadcasts were recorded by Stratton. On others he made notes. The contents of all apparently were made available to the Immigration Service and the district attorney. Also, considerable use was made of the broadcast matter before the grand jury.

At the threshold of trial on separate indictments which were consolidated for trial, the defendants moved to suppress the evidence obtained from Stratton's monitoring of the Sugden broadcasts. A hearing was had inquiring into the circumstances of Stratton's activities and the involvement of his evidence in the case. Most of the facts elicited are summarized hereinabove. During the hearing the Sugdens' counsel said: "If it please the court, I believe that counsel indicated this morning that the government has made substantial use of these transcripts in the preparation of the cause, and that the government proposed to substantially rely upon the testimony of Mr. Stratton in the presentation of its case." And the prosecutor replied: "That is a correct statement, counsel."

The trial court was of the opinion that the government's activities in developing and prosecuting the case ran counter to 47 U.S.C.A. 605 and granted the motion to suppress. Also, the trial judge quashed the indictments. The government's concession, above quoted, was a factor in quashing of the indictments and suppressing the evidence.

Section 605, above mentioned, reads as follows:

"Unauthorized publication or use of communications

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning there-

of, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

The government must concede that if the facts were the same save that Stratton had tapped the Sugdens' telephone line and obtained the same information without the Sugdens' consent as he did by monitoring the air waves, then the trial court's rulings were correct. Weiss v. United States, 308 U.S. 321. But the government says listening on the air and wire tapping are different. Therefore, it appeals to this court. It thinks the fact that Stratton had a legal duty to listen in order to find illegal operations under the Federal Communications Act entitled him to turn the information over to other agencies of the government. Also, it is argued in the government's unusually excellent brief that

picking up an air wave message and disseminating it as Stratton did is not an interception, is legal and something that Stratton surely and maybe any citizen could do anyway.

Perhaps a few background matters should be disposed of first. It is well to note that the defendants do not contend there was a violation of the Fourth Amendment or the Fifth. This is for the reason that Olmstead v. United States, 277 U.S. 438, is assumed to be the law of the land still. Second, it is to be observed that Section 605 nowhere within its own corners is designated as a rule of evidence. It has certain civil and criminal significance by virtue of other sections of the Federal Communications Act. 47 U.S.C.A. 153, et seq. It becomes, however, a rule of evidence for federal courts by judicial construction. Nardone v. United States, 302 U.S. 379. Further, Section 605 has applicability to intrastate messages as pointed out in Weiss v. United States, supra.

It seems implicit in the act that agents of the Federal Communications Commission can do some "spying" on the air waves, i.e., intercept.[2] The Commission is charged with enforcing the act. Except by listening, how can the Commission tell with certainty that a station is using its assigned frequency? The Commission must police for profanity, which is proscribed by the act.

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[2]A good note on the meaning of "interception" is to be found in 54 Michigan Law Review, 623 (February, 1955). Section 153 of the Act (47 U.S.C.A. 153) pinpoints the definition of wire communication as "between the points of origin and reception." The quoted words take on significance in the cases of recordings of telephone conversations and in the case of a person disclosed to only one converser who listens on an extension line or sits beside a party to the conversation and overhears. Such cases are collected in Flanders v. United States, 6 Cir. 222 F.2d 163.

The same Section 153, defining "radio communication," does not mention the elements of points of origin and reception.

In this court's view on radio, except as to a public broadcast anyone who listens intercepts if he is not a party to the communications or is not with a party.

The purpose of Section 605 is generally said to be to protect the "means"[3] of interstate communication. Goldman v. United States, 316 U.S. 129. At first look, it is difficult to see how a man with a farm radio has any privacy and how silencing him who hears conversations on the farm radio protects any privacy or the means of communication. However, the very limited privacy which Section 605 gives the user of radio for communication may tend to encourage the dispatch of messages via radio over and above the use that would be made of the means if personal messages were part of the public domain available tomorrow, for example, for the commercial purveyor of gossip.

While the telephone does have more privacy than private radio, yet we think that the government agent who monitors cannot make use of the fruits of his monitoring if he finds the station legally on the air and the persons using the station legally authorized to operate it. That is, he can listen for the purpose of enforcing the act and make such use of the information as tends to enforce the act.

Weeks v. United States, 232 U.S. 383, and the two cases of Nardone v. United States, 302 U.S. 379 and 308 U.S. 338, announce rules of evidence which it is assumed Congress may change.

We think here that unless the Congress orders otherwise, the exclusionary rules of Weiss and Goldman, supra, are to be applied to listening in (at least at a point away from the sender and receiver and without the consent of either) on non-public broadcasts by both private individuals and all public officers save in connection with the Federal Communications Commission's necessary policing for violation of the act. And in connection with such policing, information can be used no further than to effect

---

[3]Herein, we consider the "means" as licensed stations manned by licensed operators.

the policy of the act by criminal prosecution thereunder or by use of other appropriate procedures.

The theory of conduct of the officers in the field in the instant case (although it is said that the Immigration Service did not have the equipment to listen to Sugden's radio) seems to have been, "The Federal Communications Commission can legally listen. So we shall use their ears for what we, the Immigration Service cannot do." In view of Section 605, we think that if Congress wants the Federal Communications Commission to go into the general crime detection business it should say so. If it wants to authorize the Immigration Service to listen,[4] we assume it may do so. We shall not put either agency there by judicial construction.

Here in Sugden's case a special situation exists as to all of his and Mrs. Sugden's broadcasts save one day's. Although the station was licensed, the two Sugdens were not licensed operators until September 17th. Therefore, they were not legally using the station before September 17th. To throw a mantle of protection provided by Section 605 over an outlaw broadcast is to abandon reason. Therefore, we hold that as to private radio communications, before any right of privacy exists under Section 605 the voice must be legally on the air; otherwise one who hears, and especially the Federal Communications Commission, may make full disclosure. Giving the one who broadcasts without authority any protection under Section 605 could not tend to protect the means of communication.

Even though divulgence of the content of unlicensed broadcasts is not prohibited by Section 605, there was no attempt in the hearing before the trial court to distinguish between the use made of messages intercepted before September 17th and what was heard thereafter.

It is this court's view that the trial court should reexamine

[4]That is, listen and divulge.

the motions of defendants on the basis that free use of any radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment. And possibly the court may want to exercise its power to open up the proceedings of the grand jury before it rules on dismissing the indictments. The last-mentioned matter will involve the use of a wise discretion, depending on how the hearing otherwise develops.

Prima facie, the general thesis this court adopts may seem absurd. It may be said that with radio he who broadcasts, in the very nature of things, has no privacy. It may be said that shutting the government's mouth if it listens to the radio in no way protects the means of communication, that is, the instrumentality which is said to be the object of Section 605. If such be true and the end result be not desirable, then the appeal should be made to the Congress. Too much case law already has been built up in the telephone cases for this court to act as a free agent now.

The orders dismissing the causes and suppressing evidence are reversed for proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed Sep. 30, 1955.

Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* *vs.* ROBERT V. H. SUGDEN and JEAN S. SUGDEN, *Appellees.*	No. 14,405

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Orders of the said District Court dismissing the causes and suppressing evidence, be, and hereby are reversed, and that this cause be, and hereby is remanded to the said District Court for proceedings not inconsistent with the opinion of this Court.

(ENDORSED) Judgment

Filed and Entered: September 30, 1955

PAUL P. O'BRIEN, Clerk.

ORDER MODIFYING OPINION

Before: STEPHENS, FEE AND CHAMBERS, Circuit Judges

The opinion filed herein on September 30, 1955, is modified as follows:

(1) The last sentence in the first full paragraph on Page 5 of the printed opinion is modified by striking therefrom the last sentence which reads as follows:

"The Commission must police for profanity, which is proscribed by the act."

This sentence is eliminated for the reason that it is unnecessary for the decision of the case.

(2) After the word "indictments" in the third sentence of the second paragraph on Page 7 of the printed opinion footnote "5" is added to read as follows:

"5. This court is without knowledge of whether or not grand jury proceedings are stenographically reported in the District of Arizona."

ALBERT LEE STEPHENS

JAMES ALGER FEE

RICHARD H. CHAMBERS

Circuit Judges

(ENDORSED) Filed

November 10, 1955

PAUL P. O'BRIEN,

Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, November 10, 1955

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellees, filed October 26, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

APPENDIX D

SEC. 303, Chapter 5, Title 47 U.S.C.A.

§303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect t its external effects and the purity and sharpness of the emission from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice

to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary

to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party. (June 19, 1934, c. 652, § 303, 48 Stat. 1082, as amended May 20, 1937, c. 229, § § 5, 6 (a, b), 50 Stat. 190, 191.)

SEC. 312, Chapter 5, Title 47, U.S.C.A.

§312. Administrative sanctions—Revocation of station license or construction permit

(a) Any station license or construction permit may be revoked—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in resfusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe, any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States; and

(5) for violation of or failure to observe any cease and desist order issued by the Commission under this section.

Cease and desist orders

(b) Where any person (1) has failed to operate substantially as set forth in a license, or (2) has violated or failed to observe

any of the provisions of this chapter, or (3) has violated or fail to observe any rule or regulation of the Commission authorized this chapter or by a treaty ratified by the United States, the Co mission may order such person to cease and desist from such actio

Order to show cause

(c) Before revoking a license or permit pursuant to subsectio (a) of this section, or issuing a cease and desist order pursuant subsection (b) of this section, the Commission shall serve upo the licensee, permittee, or person involved an order to show caus why an order of revocation or a cease and desist order should no be issued. Any such order to show cause shall contain a statemen of the matters with respect to which the Commission is inquirin and shall call upon said licensee, permittee, or person to appea before the Commission at a time and place stated in the order, bu in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Burden of proof

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Procedure for issuance of cease and desist order

(e) The provisions of section 1008 (b) of Title 5 which apply with respect to the institution of any proceeding for the

revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order. June 19, 1934, c. 652, § 312, 48 Stat. 1086, amended July 16, 1952, c. 879 § 10, 66 Stat. 716.

SEC. 326, Chapter 5, Title 47, U.S.C.A.

§ 326. Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. June 19, 1934, c. 652, § 326, 48 Stat. 1091, amended June 25, 1948, c. 645, § 21, 62 Stat. 862.

SEC. 501, Chapter 5, Title 47, U.S.C.A

SUBCHAPTER V. PENAL PROVISIONS: FORFEITURES

§ 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or

by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, § 501, 48 Stat. 1100; as amended Mar. 23, 1954, c. 104, 68 Stat. 30.

SEC. 605, Chapter 5, Title 47, U.S.C.A.

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmittting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving,

divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, § 605, 48 Stat. 1103.)

SEC. 1461, Chapter 71, Title 18, U.S.C.A.

§ 1461. Mailing obscene or crime-inciting matter

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. June 25, 1948, c. 645, 62 Stat. 768.

SEC. 1463, Chapter 71, Title 18, U.S.C.A.

§ 1463. Mailing indecent matter on wrappers or envelopes.

All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, and all postal cards upon which, any delineations, epithets, terms, or languauge of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent, are nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable matter, or knowingly takes the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same,

shall be fined not more then $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

§ 1464 Broadcasting obscene language

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 769.

SEC. 259a, Chapter 6, Title 39, U.S.C.A.

§ 259a. Exclusion from mails of obscene, lewd, etc., articles, matters, devices, things, or substances

Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451.

BRIEF FOR THE UNITED STATES

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370701—56

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 555

ROBERT V. H. SUGDEN AND JEAN S. SUGDEN, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19–26; R. 89–95) is reported at 226 F. 2d 281.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 30, 1955 (Pet. 27; R. 96) and a petition for rehearing was denied on November 10, 1955 (Pet. 29; R. 98). The petition for a writ of certiorari was filed on December 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the rule barring the use in evidence of information obtained by intercepting wire or radio communications applies, in a prosecution for violation of the immigration laws, to the use of information obtained by agents of the Federal Communications Commission in the course of monitoring radio communications sent by an unlicensed operator.

STATUTES INVOLVED

The pertinent provisions of the Federal Communications Commission Act of 1934, 48 Stat. 1064, c. 652, as amended, 50 Stat. 56, are as follows:

> Section 318 (47 U. S. C. 318):
>
> The actual operation of all transmitting appartus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: * * *
>
> Section 501 (47 U. S. C. 501):
>
> Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and know-

ingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

Section 605 (47 U. S. C. 605):

* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

Two indictments returned in the United States District Court for the District of Arizona charged (1) that petitioners from about August 23, 1953, to September 18, 1953, conspired to violate the immigration laws and (2) that petitioner Robert V. H. Sugden unlawfully concealed certain named aliens in violation of 8 U. S. C. 1324 (a) (3) (R. 3–10).[1]

Prior to trial, petitioners moved to suppress evidence obtained by the government through monitoring of petitioners' radio communications (R. 10–13). At the preliminary hearing the following evidence was adduced:

[1] In two additional indictments not involved in this petition the petitioners were charged with violations of the Communications Act by reason of their operation of a radio station without operators' licenses and in violation of the terms of the station license.

On August 27, 1953, petitioners obtained their Federal Communications Commission station license to operate a radio station which had just been installed in their home for use in connection with their farming activities (R. 62–64, 68, 71). They operated the station in August and September, although they did not secure their individual operator's licenses until September 17 (R. 47, 65, 68, 72, 74). The delay in securing their individual operator's licenses was due to their filing incompleted forms (R. 46).

Without petitioners' consent or knowledge, Robert J. Stratton, an engineer employed by the Federal Communications Commission, monitored petitioners' radio communications on September 4, 9, 10 and 18, 1953, upon the basis of a report from the Department of Justice that petitioners were using the radio for unauthorized purposes (R. 33–35). Mr. Stratton made notes and recordings of the communications, forwarded them to Washington and made them available to the United States Immigration Service (R. 37–39). He appeared before the grand jury which returned the present indictments and testified generally as to the monitored communications (R. 40). He also discussed the communications with the United States attorney in charge of the instant case (R. 42–43). The government's questioning of petitioners' former employees also involved the use of the monitored communications

(R. 49–51, 52–54, 58–59). The United States attorney stated that he made substantial use of the monitored communications in the preparation of the government's case (R. 61).

Petitioners testified that they relied on the Motorola representative who sold them the radio station to take care of everything, that he did not advise them that they could not operate the station without operator's licenses and that they were unaware of the necessity of having such licenses as a prerequisite to using the station (R. 62, 65, 72–73). However, radio technician Kieling of the local sheriff's office testified that early in August he warned petitioner Jean Sugden against the use of the station without an operator's license and left F. C. C. application forms with her to execute and mail (R. 76–78).

The district court ruled that all of the evidence and information obtained by monitoring should be suppressed. It also dismissed the indictments as having been "tainted" by use of the illegally obtained evidence before the grand jury. (R. 22–23.)

The Court of Appeals was of the view that, while monitoring of radio communications by agents of the Commission is lawful, disclosure of information so obtained is limited to enforcement of the Communications Act. But it held the prohibition against publication does not apply to messages sent by persons such as petitioners

who were operating without licenses. Hence, the court held that the monitored communications occurring before September 17, when petitioners received their licenses, were admissible in evidence before the grand jury and would be admissible at the trial. (R. 94–95.) It reversed the trial court's orders suppressing the evidence and dismissing the indictments and remanded to the trial court for further proceedings (R. 96).[2]

ARGUMENT

The court below based its reversal of the judgment of the district court on the narrow ground that radio communications sent by operators not licensed as required by the Federal Communications Act are not entitled to the protection of Section 605 of that Act, as interpreted by this Court in *Nardone* v. *United States,* 302 U. S. 379, and *Weiss* v. *United States,* 308 U. S. 321. If that decision is correct, as we submit it clearly is, there is no need even to reach the question which

---

[2] With respect to the further proceedings, the court said (Pet. 25–26; R. 95):

"It is this court's view that the trial court should reexamine the motions of defendants on the basis that free use of any radio communications made before September 17th can be made. The district court will need a new hearing before ruling on the suppression of evidence and quashing the indictment. And possibly the court may want to exercise its power to open up the proceedings of the grand jury before it rules on dismissing the indictments. The last-mentioned matter will involve the use of a wise discretion, depending on how the hearing otherwise develops."

petitioners attempt to raise (Pet. 9–15) as to the extent to which employees of the Federal Communications Commission may monitor radio communications by licensed operators over licensed stations or the question of whether illegal activities discovered in the course of such monitoring may be divulged.[3] Our main discussion, therefore, is confined to that narrow issue, which is determinative of the instant case.

The *Nardone* principle which petitioners seek to apply here was not the result of a clear cut literal prohibition which was contained in the language of Section 605, but was the "translation into practicality of broad considerations

---

[3] We agree with the court below that employees of the Commission do have the power to monitor communications by private operators and to utilize information so obtained in the enforcement of the Communications Act. But, contrary to the opinion below, we believe that if, in the course of bona fide legal monitoring, other illegal activities are uncovered, information with regard thereto may properly be divulged to the proper law-enforcement agencies. The situation, in our view, is the same as that presented where, in the course of a valid search, unsought evidence of another crime is uncovered. Such evidence may then properly be seized and used. *Harris* v. *United States*, 331 U. S. 145. Since, however, the decision of the court below remanding the case may result in the government's obtaining the use of all the evidence it needs in the present case, the issue was not deemed appropriate for review in this case. In the present posture of the case, the contention that all radio communications may be monitored and any illegal activities uncovered divulged represents an independent ground to support the decision below, one which for the reasons stated in the text we do not believe it is necessary for the Court to reach.

JAN 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 555

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE

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JEAN S. SUGDEN, his wife,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

Petitioners would trespass upon the Court's time in reply briefly and in only two particulars.

A. The Government in its Brief in Opposition unwittingly would lead the Court to believe that Petitioners *in fact* were warned that operation of the station without operators' permits was illegal.

A reading of the records discloses no such fact. True the witness Kieling testified (R. 76, 77, 78):

"Q. Now, was there any discussion of any requirement about an operator's permit and the operation of the radio?

"A. Yes, I furnished them with the forms, and showed them how to fill them out, and told them when they got them back to sign their completion report and send it in.

"Q. Was there any discussion about prohibition of operating the radio prior to getting the license?

"A. Yes.

"Q. And can you tell us about that?

"A. That was way back in July I believe, or the first of August.

"Q. And can you tell us the place, the time, and the circumstances?

"A. It was on the telephone, and they wanted me to come out and hook up the base station. And I told them I couldn't hook it up because they didn't have their *station license* yet. And he wanted to use it, and I told him if he would hook it up to 110 and put the aerial on it, and if the milliammeter (57) didn't read over 200 milli-amps, it wouldn't hurt. If it was too much it would damage the tubes, but it wouldn't hurt it seriously.

"Q. Was there ever any discussion about any prohibition about operating the station without an operator's license?

"A. Yes, when I was there the 8th.

"Q. And what was that?

"A. That was when I gave them the forms and told them I couldn't fill out their completion report because they didn't have their operator's license. I told that to Mrs. Sugden. She was the only one there at the time. That was at the house.

"Q. She was at the house?

"A. She was at the house.

"Mr. Holohan: That is all.

Cross Examination

"Q. (By Mr. Wilmer): You told her you could not complete it because they didn't have their operator's license?

"A. No, I couldn't complete it because they didn't have—

"Q. I asked you what you said. You said you couldn't complete it because—

"A. Because she hadn't received her operator's permit. (58)

"Mr. Wilmer: That is all." (Emphasis supplied)

While the witness states his conclusion he warned petitioners, when asked what he said the conclusion he drew is shown to be groundless and not supported by the words he spoke. If anything, the advice which Kieling gave as to how to hook the station up would negative any conclusion of a warning of illegality. The most that can be drawn from his testimony and all that can be drawn from it is the fact he told them the completion form could not be filled out until their operators' permits were received.

B. The net effect of the ruling of the Circuit Court, if affirmed, will be to send the cause back to the District Court to permit the Government to do what it should have done in the first place, if it is able so to do.

Petitioners, (accepting the test as to admissibility which the Circuit Court declares) fairly and clearly tied to the Government's cases the taint of illegality; clearly established that evidence illegally obtained played an important role in trial preparation, in "coaxing witnesses to talk" and in persuading the Grand Jury to indict.

On the hearing in the District Court the Government made no effort to winnow out the good from the evil in the face of *the Casey decision* laying down the test which the Circuit Court has here reaffirmed.

Is it Federal Justice that Petitioners bear the heavy costs and anxiety of the appeal to the Circuit Court and of this proceeding to the end that the Government may discharge its obligation of demonstrating freedom from the taint of illegality upon which obligation it defaulted at the hearing before the District Judge? Does not the presumption prevail that if the Government could

do so it would have done so on the hearing, since *Casey vs. United States* had stated the position of the Ninth Circuit as to how far the protection of Section 605 would be extended where use of radio was involved?

We are frankly appalled at the almost contemptuous disregard for the prohibitions of Section 605 and for the language of this Court demonstrated in this matter.

Accepting the test of *Casey vs. United States* but for the happenchance of a routine form incompletely filled out (R. 47, 48) both recordings would have been at least illegally disclosed; a crime of felony proportions against the United States would have been twice committed instead of once with the concurrence and approval of those charged with enforcing the laws of the United States.

We respectfully submit the petition be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1955

No. 555

ROBERT V. H. SUGDEN and
JEAN S. SUGDEN, his wife,
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UNITED STATES OF AMERICA,
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BRIEF FOR THE PETITIONERS

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OPINION BELOW

The opinion of the Court of Appeals is reported at 226 F. 2d 281. (R. 87 et seq.)

JURISDICTION

The judgment of the Court of Appeals was rendered September 30, 1955 (R. 94). A petition for rehearing was denied November 10, 1955 (R. 96). The petition for a writ of certiorari was filed on December 8, 1955, and granted January 23, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether agents of the Federal Communications Commission are authorized to "wire tap," i.e., intercept and listen to radio communications transmitted by a private farm radio installation without limitation for the purpose of determining if (a) the radio apparatus is being used for the purpose for which it has been licensed by the Federal Communications Commission; or, (b) if the radio installation is being used for any unlawful purpose; and whether, having so listened in on private communications, transcriptions of such intercepted conversations may be divulged by such agents and employed by the Government in a Federal Court in developing witnesses and building a criminal case before the Grand Jury in securing indictments and as evidence on the actual trial of the case so developed.

In the event the foregoing questions are answered in the negative then. (If in the affirmative — this ends this lawsuit)

II. Whether the unintentional failure by the operator of a farm radio-transmitting station to obtain a "perfunctory" permit as such operator frees the communications so made from the protection of Section 605, 47 U.S.C. and in legal effect authorizes agents of the Federal Communications Commission to "wire tap" such communications at the behest of the Department of Justice in aid of an investigation then under way of suspected criminal activity on the part of such operator unrelated to the communications field and renders communications so intercepted admissible in a Federal Court as evidence against such operator.

If the answer to Question II by this Court is contrary to that given by the Circuit Court of Appeals, i.e., is to the effect that such omission does not defeat the public policy expressed in Section 605, the following question becomes moot; otherwise it is for decision.

III. Whether, it appearing without conflict in the evidence that Federal Communications Commission agents had "wire tapped" farm radio communications of petitioners in aid of a criminal

investigation not related to the communications field at a time when both station and petitioners were properly licensed and also at times before petitioners had received their applied-for operators' permits and such intercepted communications were indiscriminately used by the Government before the Grand Jury which indicted petitioners and in trial preparation, the trial judge committed error in suppressing the evidence so obtained and used and dismissing the indictment when the Government, after petitioners clearly tied such use of the illegally intercepted communications into the Government's case, made no offer or effort (a) to disprove that the evidence concededly illegally obtained (by the Court of Appeals) played a substantial part in causing the Grand Jury to indict; (b) to disprove that such evidence so obtained was a substantial factor in the trial preparation of the Government, or (c) to convince the trial court that such illegally intercepted evidence would not be used on the trial of the action and that evidence, free from the taint of illegality was at the disposal of the Government to prove its case.

STATUTES INVOLVED

The pertinent provisions of the Federal Communications Commission Act of 1934, 48 Stat. 1064, c. 652, as amended, 50 Stat. 56, are as follows:

Section 318 (47 U.S.C. 318):

> The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: * * *

Section 501 (47 U.S.C. 501):

> Any person who *willfully* and *knowingly* does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who *willfully* and *knowingly* omits or fails to do any act, matter, or thing in this Act required to be done, or *willfully* and *knowingly* causes or

suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both. (emphasis supplied)

Section 605, (47 U.S.C. 605):

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, § 605, 48 Stat. 1103).

STATEMENT

Petitioners, Robert V. H. Sugden and Jean S. Sugden, husband

and wife, were indicted in the District Court sitting at Phoenix, Arizona, on October 7, 1953, of conspiracy to violate 18 U.S.C. 371 (R. 3 et seq.). Briefly, they were charged with having confederated with certain co-conspirators not indicted to violate 18 U.S.C. 371 by shielding from detection, or so attempting, illegal aliens, i.e., "wetbacks." The conspiracy was to be accomplished, it was charged, through installation of a two-way farm radio in the Sugden home with mobile receiving and sending units in farm trucks. The wife was charged with broadcasting warnings to the drivers of these trucks to the effect that the "redcoats (immigration officers) are coming" thereby enabling the co-conspirators in the trucks to hie themselves to the cotton fields and conceal or attempt to conceal the "wetbacks." Various overt acts were charged including one such act on *September 18, 1953.*

Robert V. H. Sugden was also indicted on the same date (R. 8 et seq.) for a claimed violation of 8 U.S.C. 1324(a)(3) in that he was charged with concealing or attempting the concealment of some 17 wetbacks in separate counts of the indictment. Subsequently all but 5 of these counts were dismissed by the Government. This indictment specifically charged separate acts of concealment on *September 17 and September 18, 1953.* These indictments were consolidated for trial by stipulation.

Petitioners seasonably moved to suppress all evidence gained either directly or indirectly by the Government through certain interceptions of petitioners' radio communications (R. 10 et seq.) and, on the hearing of these motions, the Government conceding that these intercepted communications had been employed before the Grand Jury in securing the indictments of petitioners (R. 61), orally moved in open court that the indictments be dismissed (R. 78, 79). Upon hearing ti. Motion to Suppress these facts appeared:

Petitioner, Robert V. H. Sugden, prior to June of 1953, contacted one Bud Bridges, technician and salesman for Motorola in the Yuma, Arizona, area, (R. 62) with respect to purchasing a two-way radio transmitting apparatus for use on farm vehicles

such as pickup trucks, with the result such an apparatus was purchased from Motorola. Petitioners knew of the outstanding position of Motorola in the radio and electronics field, knew nothing of Federal Communications Commission law or regulations and depended entirely upon Bridges for technical advice. (R. 62, 63, 64, 70, 72) He completed their station license application and such license issued August 26, 1953. (R. 63, 64) Bridges told petitioners operators' permits would be necessary, that no examination was required and that he, Bridges, would take care of securing them. (R. 63, 64, 65, 71) A paper accompanied the station license when received by petitioners which contained, among other statements, one to the effect that operators' permits were held, *or were being obtained*—and petitioners assumed Bridges was taking care of this matter. (R. 65, 71, 72)

After the station license arrived Bridges left some forms, told petitioners to fill them out and send them in. (R. 64) *The station was then in operation and Bridges did not warn petitioners such use would be illegal until their permits arrived.* (R. 65) Petitioners completed the forms and sent them in September 9th, (R. 65) but due to their failure to complete the forms properly they were returned for completion with the result their actual permits were in the hands of petitioners September 17th. (R. 45, 46, 74)

The radio technician for the Yuma County Sheriff, Kieling, who acted as technician for the installation of the unit, testified he made a final check of the station September 8th and told petitioners to finish the completion form when they got their permits and send it in. (R. 76) He further testified he told Robert Sugden in July he could not hook up the *station* because he did not have his *station* license but did tell him how to hook it up himself. (R. 77) The most this witness told petitioners was that he could not fill out their completion report as they did not have their operators' permits. *He at no time warned petitioners not to operate the station until the permits arrived* and the station was openly in operation. While on direct examination (R. 76, 77) he stated

he warned petitioners not to operate the station, on cross-examination he admitted all he told Mrs. Sugden was that he couldn't complete their completion report since the operators' permits had not arrived. (R. 78)

These operators' permits issue as a matter of course without examination if the applicant indicates American citizenship, no felony history and familiarity with the regulations of the Federal Communications Commission. (R. 45, 48) In fact, the Commission can waive issuance of these permits if it finds such to be in the public interest. (Section 318).

The station operated between its location in the Sugden home where Mrs. Sugden operated it along with taking care of her household duties, (R. 71, 72) and mobile units in trucks with the operators of the trucks talking back and forth with the operator in the Sugden home. (R. 4) No operators' permits are required of the person using the unit in the truck to talk with the central station. (R. 69)

On September 4, 1953, Robert J. Stratton, assistant engineer in charge of the Eleventh District Office of the Federal Communications Commission with headquarters in Los Angeles, came to Yuma, Arizona, with equipment designed to intercept and listen to radio communications on direction of the Washington office of the Federal Communications Commission to make an investigation of petitioners' activities by reason of a complaint by the Department of Justice, which in turn was based upon a complaint by the Immigration Service. (R. 34, 35) He contacted the Immigration Service upon arrival and proceeded to listen in on petitioners' conversations by radio. (R. 38, 39) Petitioner Robert V. H. Sugden did not operate the central station and no permits were required of the persons using the mobile unit (R. 69) (unless it be contended as to the conspiracy indictment that the acts of Jean S. Sugden in transmitting signals without a permit were also the acts of Robert as a claimed co-conspirator. It is suggested the failure to seasonably obtain a permit was not an act in furtherance of the claimed conspiracy and played no part therein

and hence such omission being unrelated to the conspiracy would not bring Robert within the familiar rule).

Stratton made notes of this first interception, which were promptly turned over to the Immigration Service. (R. 38) Stratton returned with a partner on the 10th of September and again on the 18th of September upon which two occasions the intercepted conversations were transcribed and copies of such transcriptions promptly turned over to the Immigration Service. (R. 37, 38)

Stratton testified before the Grand Jury as to the substance of each conversation so intercepted and copies were made available to the United States Attorney who used them in confronting and questioning employees of petitioners, some of whom also testified before the Grand Jury which returned the indictments here involved. (R. 40, 41, 42, 43, 61)

The District Judge on the conclusion of the hearing granted the Motion to Suppress and to Dismiss. (R. 22, 23, 24, 25, 79, 80, 81) The Circuit Court reversed, holding the transcriptions made subsequent to the issuance of petitioners' operators' permits were illegally made but those prior thereto were lawfully made and available for use by the Government; the Court apparently did not consider the question as to the obligation of the Government to free its case from the taint of the illegally gained evidence once such use of such evidence by the Government was established.

Petition for Rehearing was denied November 10, 1955. (R. 96)

SUMMARY OF ARGUMENT

Questions I and II

There is no evidence in the record to support even an inference that the failure by petitioners to obtain an operator's license prior to operating the station was other than inadvertent and innocent of wrongful purpose. Such failure in no fashion served the object of the claimed conspiracy or any other wrongful purpose. Petitioners rightfully relied upon the Motorola representative to

guide them and while he advised permits should be obtained he agreed to take care of this detail. The station was licensed and in open operation and he did not warn them not to operate it until their permits arrived. Despite the contention of the Government to the contrary all that Kieling the technician from the sheriff's office told petitioners was to send in the completion forms when the operators' permits arrived. The permits were, as the Circuit Court characterized them "perfunctory;" issued by the Communications Commission as a matter of course on application if the applicant indicated American citizenship, no felony history and familiarity with its rules and regulations. The applications were filed with the Commission September 9th but due to a failure by petitioners to properly mark or check the application form it was returned to petitioners for completion and the permits were not therefore received by petitioners until September 17th.

The purpose of Stratton, the Federal Communications Commission agent, in going to Yuma was not to check to see if petitioners had proper permits—indeed this question was not involved in any respect for the records of the Commission would have readily supplied the answer and, in fact, during the course of the "wire tapping" procedures by Stratton the Commission licensed petitioners as operators. His purpose and that of his superiors in sending him to Yuma was to, in cooperation with the Department of Justice and in direct defiance of the ruling of this Court and the prohibitions of Section 605, intercept and divulge communications without regard to whether or not the operators were licensed; for the purpose of assisting the Immigration Service in making a case against petitioners for conspiracy to conceal aliens.

The history of Section 605 warranted no conclusion that it was not intended to apply to radio for it was a part of the Radio Act of 1927, brought forward into the Communications Act of 1934 (c. 652, 48 Stat. at L. 1063, 1103). This Court had in *Weiss vs. U. S.*, 308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269, applied the sanctions of Section 605 to local or intra-state communications and in *Nardone vs. U. S.*, 302 U.S. 379, 381, to federal officers.

And Section 303(m), which details the causes for which an operator's permit may be revoked, contains no language which indicates that the Congress intended to place a lawful "peeping Tom" at the window and keyhole of every private radio station privileged to lawfully violate the operator's right of privacy so long as the lust of such "peeping Tom" be privately enjoyed.

The Circuit Court weighed in the scales of justice the innocent and inadvertent failure of Jean S. Sugden to at all times hold a "perfunctory" operator's permit before she spoke into the transmitter as against conduct which this Court has denounced as contrary to public policy and inconsistent with ethical standards which conduct was purposely entered into by federal officers and adjudged that an innocent technical oversight outweighs conduct "inconsistent with ethical standards and destructive of personal liberty * * * which involves a grave wrong."

Question III

Petitioners clearly established that the evidence unlawfully obtained by the Government (by the test adopted by the Circuit Court) was used by the Government in building its case against petitioners and in causing the Grand Jury to indict. Indeed, in the conspiracy indictment one overt act is laid as of September 18th when the permits had arrived and the second indictment of petitioner Robert V. H. Sugden laid one count on September 18th. This Court in *Nardone vs. U. S.*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. ed. 307 established the proper procedure under such a state of the record. Yet, despite the fact the Government alone knew to what extent the fruit of the poisonous tree had tainted the indictments and to what extent it would rely upon such tainted proof on the trial, it made no effort to convince the trial court that its proof had an independent origin.

ARGUMENT

Questions I and II

The record affirmatively shows that the Federal Communications Commission, in coming to Arizona for the purpose of inter-

cepting communications between petitioners, did not come here as a part of any routine checkup or other routine discharge of the duties imposed by law on that body. Rather, it was for the purpose of cooperating with the Department of Justice in an attempt to build a criminal case against petitioners (R. 34, 35). The station was then a regularly licensed station with an assigned frequency and there was no claim, or pretense of claim, that the station was not operating properly. Further, a mere routine check of the records of the Commission would have disclosed whether or not in fact the operators had then obtained their permits. At the time when the agent of the Federal Communications Commission intercepted the communications between petitioners on September 18th, the agent then knew (or should have known) that the station was fully licensed and that the operators thereof, petitioners, likewise then held the necessary permits.

We have the situation, therefore, of officers of the United States charged with enforcing its laws acting in almost contemptuous disregard of the provisions of Section 605 of Title 47, U.S.C. herein referred to as the Communications Act.

The Government in the courts below attempted to distinguish the *two Nardone cases* (302 U.S. 379, 82 L. ed. 314, 58 S. Ct. 275, and 308 U.S. 338, 84 L. ed. 307, 60 S. Ct. 266) and the *Weiss case* (308 U.S. 321, 84 L. ed. 298, 60 S. Ct. 269) on the basis that there is here involved radio conversations which were intercepted rather than telephone conversations, apparently attempting to draw some distinction due to the difference in the media through which the electrical impulses were transmitted in this case and in the cases above referred to.

The language of Section 605 draws no such distinction. In fact, as this Court noted in *Weiss*, the statutory prohibition against interception of messages and use thereof had existed from the beginning of regulation of radio, but was not extended to telephoned and telegraphed messages until the creation of the Federal Communications Commission and the consolidation of supervision over radio, telephone and telegraph in the Federal Communications

Commission. A casual reading of Section 605 rather effectively disposes of this contention, since there is not the slightest intimation even of intent to differentiate between radioed and telephoned conversations in the statutes. Inferentially, in *On Lee*, 343 U.S. 947, 72 S.Ct. 967, 96 L. ed 1270, this Court recognized that, had radio communications been there involved, Section 605 would apply.

The next position taken by the Government was to the effect that since federal agents made the interceptions as agents of the Federal Communications Commission such interception was lawful. The Government would contend that because the statute authorized the Communications Commission to make expenditures for the construction of monitoring stations and because monitoring stations previously under the control of the Federal Radio Commission were turned over to the Federal Communications Commission when that body was established therefore authority was conferred to exercise nation-wide surveillance over all communications by radio. One might with equal logic argue that since the same statute (Section 154(g)) authorizes the Commission to purchase law books, it thereby invests the Commission with authority to practice law and to hear and decide general litigation between private litigants. A careful reading of the entire act not only fails to disclose any intent to grant such authority to the Federal Communications Commission, but in fact negatives any such intent. This same contention was made in the *first Nardone case* that Section 605 should not be construed so as to hamper agents of the Government in the enforcement of its laws. This Court, however, gave full effect to the language of Section 605 which directs in clear language that "no person" shall divulge or publish the message (intercepted) or its substance to "any person" and said:

> "It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it

less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same consideration may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendment of the Constitution."

Nardone vs. U. S., 302 U.S. 379, 58 S.Ct. 275, 82 L. ed. 314.

It is equally plain that the language of Section 605 above referred to applies to agents of the Federal Communications Commission as well as to agents of all other governmental commissions. Effect cannot be given to the language of the *first Nardone case* above quoted and leave any avenue open for the use of intercepted communications by any agent of the government. If the Congress had intended to permit activities of the nature disclosed by the record, it could, in very simple language, have created an exception to the all-inclusive and broad language of Section 605. Congress did, by proviso, clearly state as to what interceptions of messages Section 605 does not apply, thereby excluding from the application of Section 605 only radio communications broadcast or transmitted for the use of the general public and signals radioed by ships in distress.

Clear it is from the foregoing that Congress had in mind in enacting Section 605 the broad sweep of its language and the question as to what, if any, messages should be exempted from the prohibition contained therein. Having this in mind, the Congress did not see fit to extend authority to the Federal Communications Commission and its agents to intercept and divulge radioed communications, which communications might come to its attention in the routine checking of station frequencies and similar matters entrusted to the supervision of the Federal Communications Commission. The provision of Section 605 here involved applies to interception of any communication *and* divulging the same. Accordingly, even if it be assumed that the Federal Communications Commission in the normal discharge of its supervisory powers might be called upon to intercept messages, none-

theless Section 605 operates to forbid divulging the same to *any* person.

It is, of course, well established that generally speaking, a proviso in its normal usage, makes the general enacting clause of the statute to which it is attached applicable to everything subject thereto not exempted through the proviso.

George Moore Ice Cream Co. v. Rose, 389 U.S. 373, 53 S. Ct. 522, 77 L. ed. 1265

McDonald vs. U. S., 279 U.S. 12, 49 S. Ct. 218, 73 L. ed. 582

White vs. U. S., 191 U.S. 545, 24 S.Ct. 171, 48 L. ed. 295

That the Congress did not intend the Federal Communications Commission to exercise a general supervisory control over all communications made through radio is clearly shown through the express prohibition against any attempt at censorship by the Federal Communications Commission found in Section 326 of the act. As originally enacted in June of 1934, the statute contained a provision making unlawful the use of indecent language in radio communications. By the amendment in 1948 (c. 645, Sec. 21, 62 Stat. 862) this prohibition against the use of indecent language was eliminated and made a separate statutory crime (Sec. 1464 Title 18 U.S.C.) separated from the Communications Act. Certainly, if it had been the intent of the Congress to permit the Federal Communications Commission to exercise a nation-wide supervision over the subject matter of radio communications, here would have been the place for an appropriate reference to that power.

Analyzing the applicable provisions of the act, particularly the portion thereof setting forth the powers and duties of the Commission, we find nothing which even remotely hints at an authorization to the Commission that its agents might intercept communications with impunity for the purpose of determining if the sender be engaged in some unlawful project. Section 303 of the act, which sets forth the powers of the Commission, demonstrates that the powers and duties of the Commission are primarily related to apportioning to applicants the bands and frequencies available,

regulating the power involved and otherwise exercising an administrative control over radio communication. It is true that in *National Broadcasting Co. vs. United States,* 319 U.S. 190, this Court indicated the Commission has powers beyond mere regulation of the engineering and technical aspects of regulation of radio communication. This case, however, involved a broadcasting facility rather than one for private communication and of course under the act as construed with reference to broadcasters, the Commission has much broader powers, since the public convenience is involved. The broadcasting there involved comes within the exception to Section 605 and it cannot be considered as even remotely authorizing what is here contended for by the Government.

Even with respect to the power of the Commission to suspend the license of any operator, Section 303(m), we find nothing to indicate the Congress contemplated agents of the Commission would censor or monitor communications for the purpose of determining if some crime might be in the making. The Congress specified six general causes for which a license might be suspended:

1. Violation of any Act, treaty or convention binding on the United States *which the Commission is authorized to administer* or any regulation made by the Commission under any such Act, treaty or convention;

2. Failure to carry out a lawful order of the master lawfully in charge of the ship or aircraft whereon the licensee is employed;

3. Wilfully damaging or permitting radio apparatus or installations to be damaged;

4. Transmitting superfluous radio communications or communications containing profane or obscene words or language, or knowingly transmitting false or deceptive signals or communications or a call signal or letter not assigned to the station being operated;

5. Wilful or malicious interference with any other radio communications or signals; and

6. Obtaining or attempting to obtain or assisting another in obtaining or attempting to obtain an operator's license by fraud.

It is significant that subdivision 1 above does not extend the power of the Commission to revoke an operator's license for violation of *any* law but *only* for violation of any *Act, treaty or convention binding upon the United States which the Commission is authorized to administer* or for violation of any regulation made by the Commission under any *such* Act, treaty or convention. The use of the word "such" in connection with regulations made by the Commission clearly relates back to limit the word "Act" to such Acts as the Commission is authorized to administer.

Certainly had the Congress contemplated that the Federal Communications Commission was to serve as an arm of the Department of Justice in enforcing our criminal statutes, here would have been the place to authorize it to suspend the license if the operator thereof was using the same in furtherance of some criminal scheme or conspiracy.

Section 303 further gives the Commission authority to *inspect radio installations* which are required to be licensed to ascertain "whether in construction, installation and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, of the conditions of the license or other instrument of authorization under which they are constructed, installed or operated." It is significant that the Congress limited the authority of the Commission to *inspect radio installations,* not to supervise, intercept and monitor all radio communications. Certainly, the intent of the statute contemplates a physical inspection of physical installations. Could a radio installation be "inspected" by intercepting its signals, not for the purpose of determining if it is on its assigned frequency and operating within its assigned power range, but for the purpose of ascertaining, in cooperation with the Department of Justice, if some criminal mischief is afoot? A complete analysis of Section 303

eliminates from consideration the possibility of any intent that Congress intended to grant to the Federal Communications Commission the broad power here contended for. In effect, the Federal Communications Commission would establish itself as a second Bureau of Investigation, and while such ready reaching for new fields of endeavor is not uncommon to federal agencies, before such assumption of power is accepted, particularly when it flies in the face of the plain language of a statute condemning the thing which the agency seeks to do, far more direct and clear language must be found in the statute authorizing it.

Turning now to Section 312, which deals with revocation of a station license or construction permit, we again find nothing indicating any thought on the part of the Congress that the Commission was to supervise the contents of private communications by radio. Certainly, had the Congress contemplated that the Commission would be authorized to freely intercept radio communications some recognition thereof would be found through the grant of authority to revoke a station license if communications were emanating therefrom in furtherance of some unlawful purpose. The five causes for revocation listed are these:

1. False statements knowingly made in the application for a license or in any statement of fact in connection therewith;

2. Conditions coming to the attention of the Commission which would warrant it in refusing a license on an original application;

3. Wilful and repeated failure to operate substantially as set forth in the license;

4. Wilful or repeated violation of or failure to observe any provision of the Federal Communications Act or rule or regulation of the Commission lawfully authorized;

5. Failure to observe any cease and desist order issued by the Commission.

Without torturing the language of the section, no support can be gained therefrom to the idea that the Congress contemplated

general supervision of the contents of all communications by radio by the Commission.

The Government next conjured up in support of its claim to exemption of the Federal Communications Commission from the prohibitions of Section 605 the bogey man of the foreign agent with the short wave radio. The argument is made that if the Federal Communications Commission should learn of this foreign agent broadcasting secret defense information of the United States to his foreign government, it should be permitted to disclose that information to the appropriate authorities. The answer to this contention is that the problem presented by this argument is for the Congress and not for the courts. Equally well might this argument apply to all telephone conversations. The only lawful purpose of any monitoring by the Federal Communications Commission with respect to private radio communications as distinguished from broadcasting is to ascertain if the assigned frequency is being used and the assigned call letters are those employed and the power expended is within the range permitted. Beyond this there is nothing in the act with respect to private radio communication as distinguished from broadcasting conferring any authority upon the Commission. Accordingly, the only legal reason for the monitoring station to listen in, in the sense of listening to the actual conversation, would be if it suspected a foreign agent of employing radio. With equal force we might argue then that if any law-enforcement agency suspected a foreign agent of employing the telephone or transcontinental cable in sending such messages, such law-enforcement agency should be permitted to tap the telephone wires.

Finally, the Government turned to the argument that since during a part of the time the witness Stratton was eavesdropping on the conversations between petitioners, they had not yet received their operators' permits, they were therefore outside the protection of Section 605. It is not disputed that on his first interception the witness Stratton did not have a wire or tape recorder available and only took notes manually, but on the interception September

10th and September 18th, a wire or tape recorder was used (R. 37). These tape recordings played a large part in the matter of inducing the claimed co-conspirators to give statements (R. 50, 51, 53, 54, 59); were used by the United States Attorney in trial preparation and he proposed to use the witness Stratton for the purpose of testifying to the contents of these intercepted messages without reference to whether intercepted September 18th or prior thereto. Plainly the use of the transcriptions taken on September 18th when no question existed as to full qualification of the station and petitioners as operators was so intermingled with the previous interceptions in use both in securing witnesses and evidence, in securing the indictment and for trial preparation that the entire proceeding was tainted from the outset with the "tainted" fruit of the interception which was plainly unlawful.

We respectfully urge the Court of Appeals has overlooked the basic underlying principle which condemns a practice such as here indulged in by the Government; has overlooked the fact that *a mere technical non-criminal omission of these petitioners cannot make something morally right which in its very essence is morally wrong; cannot make something lawful which in its very nature is abhorrent to law and decency.*

The Court of Appeals concluded:

"It seems implicit in the Act that agents of the Federal Communications Commission can do some 'spying' on the air waves, i.e., intercept * * *"

By like course of reasoning, does the Post Office Department have the right to "sample" private mailings to see if perchance some illegal activity is to be found thereby; to do some "spying" to ascertain if non-mailable matter is being transported in violation of the express prohibitions of Section 259a, Chapter 6, Title 39 U.S.C.? By the same line of reasoning as the Court of Appeals applied to radio communications, we reach the unhappy conclusion that our postmaster or letter carrier has carte blanche to open and read our most private correspondence on a "night ride" for

obscenity or crime-inciting matter in the mails. True it is that Section 303(d) authorizes the Commission to revoke the operator's license of one transmitting obscene words but so does Section 259a, Chapter 6, Title 39, U.S.C. (1954 Cum. Pocket Part) authorize the Postmaster to exclude from the mails obscene solicitation matter, and Section 1461, Title 18 requires that non-mailable obscene matter "shall not be conveyed in the mails or delivered from any post office *or by any letter carrier.*" (emphasis supplied)

The purpose of the "wire tapping" was not to ascertain if an unlicensed station was operating or if unlicensed operators were transmitting or if an unassigned frequency was being employed; the purpose was to (in cooperation with the Department of Justice and in direct defiance of said Section 605) intercept and divulge communications *without reference to or regard for* whether the station or the operators were licensed or unlicensed. Indeed, in the course of the "wire tapping" procedures operators' licenses were issued to petitioners, so plainly the Federal Communications Commission and its officials were not concerned with this phase of petitioners' activities.

Weighing then in the balance of propriety the simple oversight of the petitioners to obtain a "perfunctory" permit against the purposeful, deliberate disregard of a statute of the United States and the denunciations of this Court of "dirty business" in law enforcement, can it be said the trial court should have countenanced such conduct?

This is not evidence stumbled upon in the course of a lawful discharge of duties imposed by law upon the Federal Communications Commission; *this is evidence purposefully sought out in direct defiance of law.* Would it be said that because one operating an unlicensed motor vehicle upon the highway without an operator's license thereby becomes subject to unlawful search and seizure because he is unlawfully upon the highway and had no right to be driving the vehicle? Would the Government contend the police authorities might arbitrarily stop all motorists and

search their vehicles with the legality of such action turning upon the chance of the presence or absence of a driver's license in each instance?

We respectfully urge that the technical and innocent oversight of petitioners in failing to properly fill out a form for a "perfunctory" permit does not make them "outlaws of the ether highways," shorn of all the rights of a citizen of the United States, to be "shot on sight" by Federal Communications Commission agents stalking them, not as unlicensed operators of communications equipment and for that delinquency, but in cooperation with the Department of Justice and the Immigration Service for the claimed offense of concealing aliens—a matter generally accepted as somewhat beyond the jurisdiction of the Federal Communications Commission.

We believe we might rely upon the rule laid down in the *second Nardone case* to the effect that an unlawful interception and its use being shown by the defendant, the Government then must convince the trial court that it has an independent source of evidence necessary to convict as apparently correctly construed and applied in *U. S. vs. Coplon,* 185 F. 2d 629 C.C.A. 2, Cert. denied, 72 S. Ct. 362, 342 U.S. 920, 96 L. ed. 690.

But we cannot agree with the Government's contention that the mere lack of a purely formal permit, occasioned through lack of experience and through reliance upon the guidance of one whose experience and position warranted such reliance, can operate to overturn the protection intended by the Congress in enacting Section 605—can defeat a public policy bottomed upon considerations of ethics and morality.

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in Nardone v. United States, supra. That decision was not the product of a merely meticulous reading of

technical language. *It was the translation into practicality of broad considerations of morality and public well-being.* This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 303 US 379, 384, 82 L ed 314, 317, 58 S Ct 275. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' * * * " (emphasis supplied)

Nardone vs. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L. ed. 307

Here the station was licensed, there is no claim of any improper physical operation of the station and the failure to obtain the formal permit required was not wilful or intentional. Certainly there is nothing malum in se in the failure of petitioners to check the proper places on the application and send it in for issuance administratively of a simple permit. No public safety is involved —no loss of public funds derived from the licensing of applicant adds to the seriousness of the omission. It was a pure oversight innocently occasioned to complete a mere formal application and yet the Government would attach to it the gravest consequences and contend that thereby petitioners lost the protection of Section 605, a statute enacted to establish a rule of evidence based upon public policy and considerations of ethics and morality.

If Section 501 (general penalty provisions) applies to the use of the station by petitioners prior to securing their operators' license, it could only become applicable upon a showing that the petitioners so operated their station "wilfully and knowingly" and the record is overwhelmingly against such a conclusion. If petitioners cannot be found to have violated the penal provisions of the Act, then certainly the position of the Government, in effect making them outlaws, fair game for any over-zealous law enforcement officer, is not sound.

Question III

Should the conclusion reached by the Court of Appeals as to

the effect of the failure of Jean S. Sugden to hold an operator's license be found unsound, then a consideration of this question becomes unnecessary, since all involved intercepted communications would perforce have been unlawfully come by by the Government.

There is no argument but that, tested by the judgment of the Court of Appeals, Stratton unlawfully intercepted the conversations of September 18th. The station was licensed; both petitioners then had their permits.

There is no conflict in the evidence that petitioner Robert V. H. Sugden did not operate the central station; his use was in the field on the mobile end of the equipment installation where a permit was not required and the station used was at all times fully licensed.

There is no conflict in the evidence as to the fact that Stratton related this conversation of September 18th to the Grand Jury, a transcription thereof was supplied to the Immigation Service and the United States Attorney and was used in interrogating witnesses, as the Court of Appeals says:

> "In the matter of detection, of coaxing witnesses to speak freely upon interrogation before indictment and before trial, the government was materially aided by the fact one Robert J. Stratton * * * had come into the Yuma area with monitoring devices."

and that the Government proposed to use the various transcriptions on the trial of the cause.

Petitioners seasonably moved to suppress all of these transcriptions and related evidence.

Petitioners, pursuant to the rule laid down by this Court in *Nardone vs. U. S.*, 308 U.S. 338:

> "* * * A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first in-

stance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

as interpreted by the Second Circuit in *the Coplon case*, supra, clearly established that substantial evidence condemned as illicitly obtained by the test as to illegality established by the Court of Appeals in its opinion, was employed by the Government before the Grand Jury in securing the indictments quashed by the District Judge and in preparing its case against petitioners; and further, that it would use such evidence on the trial of the cause. These facts appearing to the satisfaction of the District Judge, we respectfully urge the burden fell upon the Government to satisfy the District Judge:

(a) That the indictments were untainted by the use of such unlawful evidence;

(b) That such evidence, so unlawfully obtained, did not play any substantial part in building the Government's case, directly or indirectly;

(c) That the evidence which the Government proposed to offer on the trial of the cause was obtained from independent sources untainted by and not traceable to such unlawful interception and divulgence.

Accepting for the purpose of this argument the distinction drawn by the Court of Appeals between communications sent by an unlicensed operator and a licensed operator, it is clear that there were two recordings made by Stratton, one when the operator's permit was in effect, one when such permits were only applied for. *The Government knew which of these transcriptions it had employed in building its case and in obtaining these indictments. It knew which of these it proposed to use on the trial of the action. These petitioners were not so advised.*

Overt Act No. 5 of the Indictment for conspiracy charges the September 18th use of the radio as an act in furtherance of the conspiracy so conclusively the transcription of this date was presented to the Grand Jury. Count 18 of the Indictment of Robert V. H. Sugden is apparently likewise based upon this transcription.

The rule which the Court of Appeals has declared as to the effect of the lack of proper licenses for use of radio communications equipment had been theretofore declared by the Ninth Circuit in *Casey vs. U. S.*, 191 F. 2d 1, and was known to the Government. In *Casey* the Ninth Circuit denied the protection of Section 605 to unlicensed operators of unlicensed radio equipment and, while a very casual opinion insofar as it decided this question nonetheless was the law of the Circuit.

Yet the Government made no effort or offer to show that the indictments were untainted by this unlawful evidence or that it could proceed with lawful evidence arising from a lawful source.

Stratton testified that he did in fact relate the entire interception procedure to the Grand Jury:

"A. Well my testimony was a running account of what had happened from the time we were first called in on the case." (R. 40)

* * * * * *

"Q. Other than testifying how you went about doing your monitoring, that is, describing your various steps in setting up your equipment, and that sort of thing, the balance of your testimony related to the substance of the conversations which you had intercepted through your monitoring equipment?

"A. That is correct, the general use of the radio in that particular case." (R. 41)

How could the District Judge remove this taint from the indictment; how could he ascertain what effect the unlawful testimony had upon the minds of the Grand Jurors?

Clearly as to the petitioner Robert V. H. Sugden *all* intercep-

tions were unlawful, since he at no time was acting as operator of the station, so under any interpretation of the facts and law—unless the Federal Communications Commission is free to "spy" as it chooses—the action of the trial judge was correct.

The net effect of the ruling of the Circuit Court, if affirmed, will be to send the cause back to the District Court to permit the Government to do what it should have done in the first place, if it is able so to do.

Petitioners, (accepting the test as to admissibility which the Circuit Court declares) fairly and clearly tied to the Government's cases the taint of illegality; clearly established that evidence illegally obtained played an important role in trial preparation, in "coaxing witnesses to talk" and in persuading the Grand Jury to indict.

On the hearing in the District Court the Government made no effort to winnow out the good from the evil in the face of *the Casey decision* laying down the test which the Circuit Court has here reaffirmed.

Is it Federal Justice that petitioners bear the heavy costs and anxiety of the appeal to the Circuit Court and of this proceeding to the end that the Government may discharge its obligation of demonstrating freedom from the taint of illegality upon which obligation it defaulted at the hearing before the District Judge?

Accepting the test of *Casey* but for the happenchance of a routine form incompletely filled out (R. 47, 48) both recordings would have been illegally made and disclosed; a crime of felony proportions against the United States would have been twice committed instead of once with the concurrence and approval of those charged with enforcing the laws of the United States.

CONCLUSION

The judgment and opinion of the Circuit Court should be

vacated and reversed and the Orders of the District Court for the District of Arizona should be reinstated and affirmed.

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No. 555

In the Supreme Court of the United States

October Term, 1955

[redacted]

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BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 555

ROBERT V. H. SUGDEN AND JEAN S. SUGDEN, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 87–94) is reported at 226 F. 2d 281.

JURISDICTION

The original judgment of the Court of Appeals was rendered on September 30, 1955 (R. 94–95) and an order modifying such judgment was filed on November 10, 1955 (R. 95). A petition for rehearing was denied on November 10, 1955 (R. 96). The petition for a writ of certiorari was filed on December 8, 1955, and was granted Janu-

ary 23, 1956 (R. 96). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in carrying out its duty to enforce the provisions of the Communications Act of 1934, the Federal Communications Commission may legally monitor transmissions by an industrial radio station.

2. Whether, when in the course of such monitoring it is discovered that a station is being used as a means of violating federal criminal laws, information concerning such violations may be disclosed to appropriate federal officers and used by them as evidence.

3. Whether Section 605 of the Communications Act, forbidding interception and divulgence or use of radio communications, has any application to transmissions by an unlicensed operator for an unauthorized purpose.

STATUTE AND REGULATIONS INVOLVED

The following provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, are directly involved:

> Section 303 (n) (47 U. S. C. 303 (n)):
>
> *Powers and duties of Commission.*
>
> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> * * * * *

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

* * * * *

Section 318 (47 U. S. C. 318):

Transmitting apparatus; operator's license.

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: * * *

Section 605 (47 U. S. C. 605):

Unauthorized publication or use of communications.

* * * * *

and no person not being authorized by the sender shall intercept any communication

> and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; * * *.

Additional sections of the Communications Act of 1934 and of the Regulations thereunder are set forth in the Statement, *infra*, pp. 12 to 17, and in Appendix A, *infra*, pp. 63 to 70.

STATEMENT

On October 7, 1953, two indictments were returned against petitioners in the United States District Court for the District of Arizona (R. 3-10). The first indictment charged that between August 23, 1953, and September 18, 1953, petitioners conspired with other persons to violate 8 U. S. C. 1324 (a) (3) relating to the harboring of aliens illegally within the United States. The object of the conspiracy was alleged to have been accomplished as follows (R. 4):

> The defendant Robert V. H. Sugden did cause to be installed in his home two-way radio equipment, from which his wife, Jean S. Sugden, did, at various times during the conspiracy dates as hereinbefore set forth, broadcast to radio equipped mobile units driven by defendant Robert V.

H. Sugden and co-conspirators Robert Sommers, George Matthews, Horace Billingsley, Beal Billingsley and Lawrence Gerhart warnings that Immigration officers were en route to cotton fields where the aforementioned described aliens were working, whereupon the aforementioned defendant and co-conspirators, who were driving the mobile units, would proceed to the cotton fields and conceal and shield from detection, and attempt to conceal and shield from detection, the aforementioned described aliens from Immigration officers.

Nine overt acts were alleged involving individual incidents of such activity (R. 4–7).

The second indictment contained five counts, each alleging a separate substantive violation of 8 U. S. C. 1324 (a) (3) during the same period.[1]

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[1] In two additional indictments not directly involved in this case the petitioners were charged with violations of the Communications Act by reason of their operation of a radio station without operators' licenses and in violation of the terms of the station license. See Appendix C, *infra*, pp. 79–91.

In addition, proceedings dealing with the revocation of petitioners' station license and suspension of their operators' permits were initiated by the Federal Communications Commission in October and November 1953, as a result of evidence of their illegal operations. Subsequently, the Sugdens having surrendered their operators' permits and the station license for cancellation, the Commission cancelled them on October 14, 1954. *In the Matter of Jean S. Sugden and Robert V. H. Sugden*, F. C. C. Docket Nos. 10780, 10781, 10740. See Appendix B, *infra*, pp. 71–78.

A. THE MOTION TO SUPPRESS AND DISMISSAL OF THE INDICTMENT

Prior to trial, petitioners moved to suppress evidence which had been obtained through the monitoring of their industrial radio facilities by engineers of the Federal Communications Commission and which had subsequently been given to the Department of Justice for use in these prosecutions (R. 10–13). At the preliminary hearing the following evidence was adduced:

Sometime in June, 1953, petitioners placed an order through one Bridges, a Motorola salesman, for two-way radio equipment to be used on their cotton farm located about nine miles south of Yuma, Arizona, close to the Mexican border (R. 41, 62, 70–71). According to the petitioners, Bridges indicated that he would take care of procuring a station license and he had petitioner Robert Sugden execute a Federal Communications Commission form of application for a Special Industrial Service license (R. 63, 70–71) to permit him to operate a base station from his home to be used in two-way communications with mobile units (pick-up trucks, tractors and plows) operating on his farm. (R. 67).

On August 26, 1953, after the base set was installed, petitioners obtained their Federal Communications Commission station license (R. 64, 71). The license bore the following notation (R. 67):

> Applicant is engaged in the activities of general farming, land clearing, insect control and cultivation. Two-way radio is proposed for use on farm vehicles, such as pickup trucks, tractors, and plows.

The license as granted included the following "Conditions" (Govt. Ex. 3):

> A. Subject to the provisions of the Communications Act of 1934, subsequent acts, treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions and requirements set forth in this authorization (including those contained on the reverse hereof) the licensee or permittee hereof is authorized to use and operate the radio transmitting facilities herein described. This authorization shall not vest in the licensee or permittee any right to operate the station nor any right in the use of the frequencies designated in the authorization beyond the term hereof, nor in any other manner than authorized herein.
>
> * * * * *
>
> C. This authorization is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained, so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such service as will serve public interest, convenience, or necessity to

the full extent of the privileges herein conferred.

* * * * *

Toward the end of August petitioners were told by Bridges that they would need operators' permits, and he offered to procure the necessary forms (R. 71–72, 74). Petitioners, however, commenced to operate the two-way base station without such permits during the latter part of August (R. 65, 72). When a radio technician employed by petitioners visited the station on September 8, 1953, to make a final frequency and modulation check, he told petitioner Jean Sugden that he could not finish the completion form until they, the Sugdens, procured their operators' permits. The radio technician gave her the operator's permit application forms and told her to fill them out (R. 76–78).

On September 9, 1953, applications for operators' permits were received in the Los Angeles office of the Federal Communications Commission from the petitioners, but were returned with mimeographed instructions informing them that the applications were incomplete (R. 46–48). On September 17, 1953, permits were issued and sent to the Sugdens by the Federal Communications Commission from Los Angeles (R. 46–47). The record does not show when these were received. Although such permits are issued without the applicant's being required to pass an examination, he must indicate on the rear of the application

that he is "completely familiar with the rules and regulations" of the Commission (R. 48).

Meanwhile, the Assistant Engineer in charge of the Eleventh District Office of the Federal Communications Commission Headquarters in Los Angeles, California, Robert J. Stratton, received a complaint from the Department of Justice, through the Federal Communications Commission in Washington, D. C., of a possible illegal use of radio in the Yuma, Arizona area (R. 34).[2]

On September 4, 1953, on the basis of this complaint, Stratton went alone to Yuma for the day (R. 35) "to confirm that the radio was being used for a purpose other than authorized." He took with him a direction finder and monitoring equipment with which he could listen to radio conversations (R. 34). When he arrived in the Yuma area, he tuned in on the frequency assigned petitioners and took notes of the conversations (R. 37).

On September 9, 1953, Stratton and another engineer, each driving an automobile equipped with direction finders, went to the Yuma area and spent two days there, during which they again monitored petitioners' station and placed its location through the triangulation method (R. 35, 40). The monitoring was done usually during periods

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[2] The complaint originated, apparently, from immigration officers stationed in Yuma, Arizona (R. 38), who had some undisclosed information about the operation of an illegally operated radio but did not know its location (R. 40).

when the farm personnel were active in the fields. At other times when the two-way equipment was not in use, the engineers monitored the assigned frequency to detect whether petitioners' station might be interfering with "out of state signals" (R. 38). The station was capable of covering a 70-mile radius, an area which extended into California and Mexico (R. 44), and as they monitored at times they were within 75 feet of the Mexican border (R. 43). The radio conversations on this and a subsequent trip were transcribed by portable tape recording (R. 37).

On September 18, 1953, Stratton returned to Yuma, and apparently again monitored petitioners' station frequency (R. 35, 36, 37). He made a routine inspection of petitioners' station and met with petitioners in their home (R. 36). He left with them a copy of the printed rules and regulations of the Federal Communications Commission (R. 37).

Stratton's notes and records were forwarded to Washington and were made available to the Immigration and Naturalization Service (R. 37–39). He appeared before the grand jury which returned the present indictments and testified generally as to the monitored communications (R. 40). He also discussed the communications with the United States Attorney in charge of the instant case (R. 42–43). The government's questioning of petitioners' former employees also

involved the use of the monitored communications (R. 49–51, 52–54, 58–59).

The district court ruled that all of the evidence and information obtained by monitoring should be suppressed. It then dismissed the indictments as having been "tainted" by use of the "illegally obtained information and evidence" before the grand jury (R. 22–23).

On the government's appeal from the dismissal of the indictment, the court of appeals stated that, although monitoring of radio communications by engineers of the Federal Communications Commission for Commission purposes is lawful and information so obtained can be used for enforcement of the Federal Communications Act, nevertheless such information cannot ordinarily be used for criminal prosecutions unrelated to enforcement of that Act. The court held, however, that where, as here, the radio facilities are being used by unlicensed operators, such transmissions are outside of the protection of Section 605 of that Act. Since the district court had made no distinction between communications monitored before September 17, 1953 (the date the court of appeals assumed that the petitioners became entitled to operate)[3] and those on September 18,

[3] This assumption is subject to some doubt since the record indicates that the operators' permits were not issued from the Federal Communications Commission office in Los Angeles, California, until September 17, 1953 (*supra*, p. 8), and the regulations of the Commission require that an operator's permit be either in the personal possession of the

1953, the court of appeals reversed the orders dismissing the indictments and suppressing the evidence, and remanded the case for further proceedings not inconsistent with its opinion (R. 87–95).

B. THE REGULATIONS

The problems in this case must be considered in the light of the regulatory scheme applicable to the particular radio facilities involved, which are here generally outlined.

The station licenses issued to the petitioners, for the operation of a two-way radio on their farm, were issued under the general provisions of Part 11 of the Federal Communications Commission Regulations pertaining to "Industrial Radio Services", and especially Subpart K pertaining to "Special Industrial Radio Services". See: 47 C. F. R. [1953 ed.] 11.501. The basis and purpose of the station licensing power under Part 11 is set forth as follows (*Ibid.*, 11.1):

* * * * *

> (b) The purpose of the rules in this part is to prescribe the manner in which parts of the radio spectrum may be made available for radio communication and control facilities to various industrial enterprises which, for safety purposes or other necessity, require radio transmitting facilities in order to function efficiently.

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operator or posted near the transmitter when in operation (see *infra*, p. 16).

A regulation entitled *"General limitations on use"* provides (*Ibid.*, 11.2):

> *General limitations on use.* The radio facilities authorized under this part *shall not be used to render a communications common carrier service* or to carry program material of any kind for use in connection with radio broadcasting. [Italics supplied.]

Industrial station frequencies are allocated to "services" rather than to individuals as such, and no licensee is given the exclusive right to the private use of his assigned frequency or to use it for any purpose other than that for which the license has been assigned. When the station license is awarded, the licensee is assigned one of a limited number of special frequencies of the radio spectrum allocated to industrial use which his station must share with other "party line" stations operating in the area and frequently performing the same kind of occupational function. See *Ibid.*, 11.8:

> *Policy governing the assignment of frequencies.* (a) The frequencies which may be assigned to stations operating in any one of the several Industrial Radio Services are listed in the applicable subpart of this part. All applicants for, and licensees of, stations in these services shall cooperate in the selection and use of the frequencies assigned in order to minimize interference and thereby obtain the most effective

use of the authorized facilities. Ea
frequency, or band of frequencies, ava
able for assignment to stations in the
services is available on a shared basis on
and will not be assigned for the exclusi
use of any one applicant: such use ma
also be restricted to one or more specific
geographical areas.

And see *Ibid.*, 11.502, listing the frequencies par
ticularly allocated to Special Industrial Radi
Service licensees on a "shared" basis. The de
termination as to which frequency a particular
station must operate on is made with reference to
the service for which the station is to be used.

The purpose for which a station licensee may
send radio communications over the particular
frequency for which permission has been granted
is strictly limited to the precise function stated in
the license except in emergency situations. See
Ibid., 11.151:

> *Permissible communications.* (a) Stations licensed under this part may transmit the following types of communications:
>
> (1) Any communication related directly to the safety of life or the protection of property; and
>
> (2) Communications considered essential to the efficient conduct of that portion of the enterprise for which the licensee is eligible to hold a station license under this part, subject to the condition that harmful interference is not caused to safety com-

> munications of stations licensed under this part.

All such calls are restricted to the "minimum practicable transmission time" (*Ibid.*, 11.151 (d)), and each station must identify itself at the end of each transmission or exchange of transmission or once each fifteen minutes of the operating period. *Ibid.*, 11.152.

Prior to operation, the industrial radio station is required to be licensed. See *Ibid.*, 11.51:

> *Station authorization required.* No radio transmitter shall be operated in the Industrial Radio Services except under and in accordance with a proper station authorization granted by the Federal Communications Commission.

The procedural steps for obtaining authorization are set forth in detail. See *Ibid.*, 11.51–11.66. In addition to the station license, the operator of a base station transmitting to mobile units as in the instant case must have a valid operator's license or permit. See *Ibid.*, 11.154 (e) (1).

> From a control point, only a person holding a commercial radio operator license or permit of any class issued by the Commission shall operate a base station or fixed station.

Ibid., 11.154 (h) provides:

> The provisions of this section authorizing certain unlicensed persons to operate mobile stations shall not be construed to

change or diminish in any respect the responsibility of station licensees to have and to maintain control over the stations licensed to them (including all transmitter units thereof), or for the proper functioning and operation of those stations (including all transmitter units thereof) in accordance with the terms of the licenses of those stations.

And see also *Ibid.*, 11.155:

Posting of operator license. (a) The original license of each base or fixed station operator, other than an operator exclusively performing service and maintenance duties, shall be posted or kept immediately available at the place where he is on duty as an operator: *Provided, however,* That if an operator who is on duty holds a restricted radio-telephone operator permit of the card form (as distinguished from such document of the diploma form) or holds a valid license verification card (FCC Form 758–F) attesting to the existence of any other valid commercial radio operator license, he may have such permit or verification card, as the case may be, in his personal possession.

* * * * *

(c) The original license of every station operator who exclusively performs service and maintenance duties at that station shall be posted at the transmitter involved whenever the transmitter is in actual operation while service or maintenance work

is being performed by him or under his immediate supervision and responsibility: *Provided,* That in lieu of posting his license, he may have on his person his license or a valid verification card.

SUMMARY OF ARGUMENT

Although petitioners present their case as though the Federal Communications Commission had been used as a detective agency by other branches of the federal government to secure evidence of criminal acts unrelated to its functions (Pet. Br. 2, 9, 11), the record demonstrates without contradiction that the Commission engineers in fact carried through the monitoring operation here in question in order to ascertain whether or not radio facilities were being used for an unauthorized purpose in violation of the Communications Act. (R. 35.) Both administrative and criminal sanctions for violation of that Act have ensued (*supra,* p. 5, fn. 1). The case therefore involves the issue of whether the Commission has authority to monitor to carry out its duties to supervise the use of the radio spectrum, and whether evidence of other crimes it obtains while so engaged may be used in the prosecution of the operators of the station for violation of other federal laws. It is the government's position that the court below took a too restricted view of the use which may be made of such evidence and that its conclusion may be supported by a broader view on that issue as well as

on the grounds it did adopt. On the separate question of whether the prohibition against listening to, and disclosing or using, radio messages is applicable to unauthorized radio emissions, we agree with the position of the court below that it is not. It is our position, however, that the use of petitioners' station was unauthorized not only because the requisite operator permits were lacking, but also because the station was not being used for the limited purpose for which it had been licensed, but to effectuate a criminal act.

I

Petitioners' claim that the monitoring operation was illegal is based upon Section 605 of the Communications Act of 1934 (47 U. S. C. 605) which prohibits the unauthorized interception and divulgence or use of radio communications. However, if Congress not only authorized but required the Commission to monitor radio communications, it is apparent that it could not have intended Section 605 to apply to such monitoring.

In Section 303 (n) of the Act (47 U. S. C. 303 (n)), Congress places the duty on the Commission to inspect all radio installations to determine whether they have been constructed and are being operated in accordance with the law and regulations and the terms of their licenses. Inspection of radio facilities for these purposes requires listening as well as looking. In fact many of the requirements of the Act and regulations can be

enforced only by monitoring, as for example requirements as to the physical properties of the signal (Sec. 303 (c)), the geographic coverage and limitations of the signal (303 (h)), interference (Sec. 303 (f)), compliance by operators with limitations on their right to use the air (Sec. 303 (m)), compliance with limitations on use in a station license (Sec. 303 (b)), and prohibitions against certain anti-social uses of stations (Sec. 303 (m), 325 (a)).

Moreover, Congress, prior to, coincidentally with, and subsequent to, the reenactment of Section 605, recognized the propriety and necessity of monitoring by making reference to it as an accepted function of the Commission (Section 4 (f) (3), 4 (g), 603 (b)). Annually, the Commission has requested funds for monitoring and, annually, funds have been specifically appropriated for that purpose.

The courts have had little opportunity to interpret Section 605 in relation to monitoring activities by the engineers of the Federal Communications Commission. None of the "wire-tapping" cases in this Court deals with this aspect of the problem. Each of them deals with the interception of wire communications which the parties had every reason to believe were private, a far different situation from radio communications which by their nature can be heard by many people.

The inapplicability of Section 605 to Commission monitoring activities is dramatically illus-

trated by the near-absurdity of applying it to the operations of petitioners' radio station. The station was to be used not to transmit messages for others, but as part of petitioners' farming activities, and for that purpose only. The frequency granted was, under the regulations, a frequency shared with others, so that all communications made over it would be heard not only by the curious idle, but also by others licensed to use that specific frequency. Since the regulations (a copy of which applicants certified they had) require inspection, petitioners were in the position of users of a third class mailing privilege who invite inspection by the postmaster and then complain because the invitation is accepted. Moreover, a license of a shared portion of the radio spectrum particularly requires the monitoring of message content since the crowded condition of the air requires strict adherence to the limitation on its use.

Far from being a "dirty business," the monitoring of radio facilities by Commission engineers is authorized by law, invades no rights of privacy, and is absolutely essential to enforcement of the limitations imposed on radio stations and operators by law and regulations.

II

The court below stated its belief that the right to monitor in the course of enforcement of the Communications Act did not make evidence so

obtained admissible in a prosecution for violation of some other federal law. No authority is cited for this proposition and we believe it is inconsistent with the principle that once evidence comes into possession of a federal officer legally, he may use it for all purposes.

In *Nardone* v. *United States,* 302 U. S. 379, and *Weiss* v. *United States,* 308 U. S. 321, this Court imposed a court-made limitation on the use of illegally obtained information as evidence. Basically this, like the rule in *Weeks* v. *United States,* 232 U. S. 383, was an attempt to discourage illegal activity by making it unprofitable. If we are right in our first point, namely, that monitoring for Commission purposes by Commission engineers is not only not illegal but is a duty, there is no occasion for a court-made rule to discourage it.

There is a strong analogy between the situation here and the search and seizure issue in *Harris* v. *United States,* 331 U. S. 145, which stands for the proposition that where police officers are engaged in making a lawful arrest, evidence found relating to an entirely separate crime is not illegally obtained. This case is also somewhat analogous to *Zap* v. *United States,* 328 U. S. 624 (reversed on another ground, 330 U. S. 800), where in the course of a legal inspection by government auditors, consented to by the petitioners, evidence of fraud against the government was discovered in form of a check which

the government agent retained in his possession. This Court found it admissible. But the present case is stronger since the element of "seizure" emphasized in the dissent in *Zap* is not here present.

III

The government's last point is an alternative ground to what goes before. Even if it should be held here, as it was below, that information obtained by monitoring duly licensed and legal radio operations may not be used in evidence in a criminal case, this protection should not be extended to communications by an unlicensed operator who exceeds the limited authority of his station license.

There is no dispute that no operator's permit had been obtained by either of the petitioners prior to the first two monitoring operations. The law and regulations require that the operator of a radio station such as that here involved have a permit. These messages were, therefore, illegally on the air.

But, furthermore, with respect to all of the messages monitored, they were not authorized because they exceeded the limited authority granted petitioners in their station license. Only essential messages concerning petitioners' farming operations were authorized. Once they went beyond this into the illegal field of frustrating the immigration law they were no better than an

unlicensed station with no right on the air at all. Just as the attorney-client privilege is torn away when it is used to cloak crime or fraud (Cf. *Clark* v. *United States*, 289 U. S. 1; *United States* v. *Bob*, 106 F. 2d 37 (C. A. 2), certiorari denied, 308 U. S. 589; *Regina* v. *Cox* [1884] 14 Q. B. D. 153), so whatever right to privacy exists in radio transmission on a shared frequency was lost when petitioners exceeded their licensed authority. As this Court has held (*Goldman* v. *United States*, 316 U. S. 129, 133), it is the means of communication which Section 605 is designed to protect, not the messages which are transmitted. There is no public interest in protecting an unlawful use of a station license by an operator who has no license.

ARGUMENT

At the outset, we think that it is well to point out that petitioners' brief is largely founded on the erroneous assumption that the Federal Communications Commission and its employees had no concern under the Communications Act and regulations in the illegal operation of petitioners' radio, but that the motive in monitoring was to obtain evidence "of suspected criminal activity on the part of such operator unrelated to the communications field" (Pet. Br. 2), "for the purpose of assisting the Immigration Service in making a case against petitioners for conspiring to conceal aliens" (Pet. Br. 9), and "in an attempt to build a criminal case against petitioners" (Pet.

Br. 11). The record establishes, to the contrary, that Stratton's purpose in going to Yuma, after receiving information through the Department of Justice that an unlocated and unidentified radio was being used illegally, was "to confirm that the radio was being used for a purpose other than authorized" (R. 35). The administrative action taken by the Commission for violations of the Federal Communications Act and the criminal proceedings based on violations of that Act strongly confirm this. See *supra*, p. 5, fn. 1. Certainly, the Commission's personnel were not barred from investigating violations of, and enforcing, the conditions of petitioners' limited license because the violations also involved crimes not related to the communications field.[4]

This case, therefore, in its broad aspect, presents the problem of the extent to which the Federal Communications Commission may, within the limitations of Section 605 of the Communications Act (47 U. S. C. 605), in the exercise of its function to regulate the varied and changing uses of the crowded radio spectrum, monitor radio transmissions and use the information so acquired. On this broad issue, which we discuss first, it is

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[4] In pointing out that in this case the Commission was monitoring in connection with its functions under the Communications Act, we do not mean to reflect one way or the other on its authority to monitor for other law enforcement purposes; such a situation is not presented by the facts of this case.

our position that the Communications Act authorizes, and the Commission's statutory regulatory duties require, its employees to monitor radio transmissions, especially radio operations under a special industrial service license authorizing transmissions for limited purposes on a frequency shared with many other users. The government then argues—and to this extent it disagrees with the court below—that where information acquired by the Commission in the course of authorized monitoring discloses the commission of a crime, that information can be "divulged" or "used", not only for the purposes of enforcing the Communications Act, but for the enforcement of criminal laws unrelated to the administration of that Act.

The actual holding of the court below presents a narrower problem. The court held "that as to private radio communications, before any right of privacy exists under Section 605 the voice must be legally on the air; otherwise one who hears, and especially the Federal Communications Commission, may make full disclosure" (R. 93). While we fully agree with this statement, we do not accede to the assumption of the court that the issue of whether petitioners were legally on the air depends only on whether they had operators' permits at the time of the monitoring. Whether they were legally on the air depends also on whether they were transmitting pursuant to the authority vested in them by the Communica-

tions Act and the terms of their station and operators' licenses. The illegality here arose not only from the fact that, with the possible exception of one day, petitioners were operating their radio station without operators' permits, but also from the fact that at all relevant times petitioners were acting completely outside of the authority of the Communications Act, the Commission regulations, and the limited authority granted by their industrial station license. They were using a radio station, licensed only to send business communications essential to their farm operation, to send illegal warning signals to alien farm workers, in itself a criminal activity. For these reasons, the protection of Section 605 was not available to petitioners.

If the government's position is correct, either on the broad or on the narrow ground, the evidence obtained from all of the monitoring operations, before and after the operators' permits were received, should be available for all purposes. Therefore, if this Court accepts the government's argument, the directions of the court below to the trial court to reexamine the evidence in order to separate that which was acquired after the permits arrived will presumably be unnecessary. Since the government did not petition for certiorari, we do not ask the Court to modify the decree of the court below. However, if the government does prevail, it may be appropriate for it to move the court below to

modify its order after the case is disposed of here.[5]

I. THE FEDERAL COMMUNICATIONS COMMISSION ENGINEERS WERE AUTHORIZED BY LAW TO MONITOR COMMUNICATIONS OVER PETITIONERS' RADIO STATION IN ORDER TO ENFORCE THE COMMUNICATIONS ACT

A. THE COMMISSION IS AUTHORIZED AND REQUIRED TO MONITOR RADIO STATIONS IN ORDER TO CARRY OUT ITS REGULATORY FUNCTIONS

Almost from the start of regulation of radio by the federal government, monitoring has been recognized as the only practicable method of supervising the use of the airwaves. Unlike the problems involved in regulating wire communications, the supervision of radio has always required inspection, not only of the transmitting and receiving equipment employed, but also of the emissions that radio stations send out. Since radio stations must of necessity operate in a

[5] Petitioners argue as a separate point (Pet. Br. 22–26) that, since the government has not seen fit at a prior stage to separate the significance of information obtained on the last day of monitoring, the indictment was properly dismissed. It is asserted that the use of the inadmissible evidence poisons the entire proceeding in the absence of a showing by the government that the grand jury acted independently of it, and that the government has not even attempted to make such a showing. However, to us it seems clear that the government was not called upon to establish such a separation of the good from the bad until there was a final adjudication on its contention that all of the evidence was admissible. Therefore, even if petitioners could escape on the basis of laches or waiver by the government, such a theory has no basis in fact in this case.

densely crowded radio spectrum, it is imperative that Commission technicians have constant access to the airwaves to detect deviations from frequency and power requirements as set forth in the regulations and in station licenses, situations resulting in interference, the quality of emissions, and instances of either unlicensed operation, or operation in violation of the authority given. See The Twenty-First Annual Report of the Federal Communications Commission for Fiscal Year ending June 30, 1955, pp. 6–7, 127–143. The necessity for such supervision has increased through the years with the development of new uses for radio and with the increase in licensing of stations to individual or group users for special limited purposes. The amount of spectrum space allotted for each type of use has been determined, after extensive proceedings, on the basis of the comparative needs for radio of each of the groups of users involved.[6]

The maximum use of the radio spectrum re-

[6] The Federal Communications Commission is charged with a continuing supervision over many uses of radio in addition to its regulation of public broadcasting. Its regulations (Title 47, Code of Federal Regulations, Subchapter IB) extend to the control of the following radio services: experimental radio services (Part 5), public radio communication services (Part 6), stations on land in the maritime services (Part 7), stations on shipboard in the maritime services (Part 8), aviation service (Part 9), public safety radio services (Part 10), industrial radio services (Part 11), amateur radio service (Part 12), land transportation radio services (Part 16), industrial, scientific and medical service (Part 18), citizens radio service (Part 19), and disaster

quires that each licensee, authorized to operate in a very limited spectrum space allocated to him, adhere strictly to Commission regulations in the operation of his radio station. It is essential to the success of the Commission's allocation plan that the frequencies allocated for any particular use be employed exclusively for the designated purpose. As is true of all radio station licensing, the legislative standard of selection is the "public interest, convenience, or necessity". 47 U. S. C. 307. Cf. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 222–223. Thus, the Commission has the obligation to insure that the persons licensed to operate on these scarce radio frequencies use them in the public interest and solely for the purposes for which they are licensed. This is especially true of radio stations transmitting on a frequency shared by many users, as in the instant case.

The authority of the Commission to perform this function is affirmatively granted by Section 303 (n) of the Communications Act (47 U. S. C. 303 (n)), which provides that the Commission shall:

> (n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United

communications service (Part 20). These services are defined at 47 C. F. R. 2.1.

> States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument or authorization under which they are constructed, installed, or operated.

It is particularly to be noted that this power of "inspection" covers not only "construction" and "installation", but also "operation." That must mean that the Commission is authorized to listen to, as well as to look at, radio stations required to be licensed by it.

The scope of this inspection, as including monitoring, is further made clear by the type of limitation and regulation which it is the Commission's duty to enforce.

The basic Section 301 (47 U. S. C. 301, *infra*, p. 63) which forbids operation of transmitters without license itself requires listening to detect unlicensed operations. And even when a station is licensed, the terms of the grant limit the frequency to be used and nature of the service to be rendered (47 U. S. C. 307), so that, if conditions of a license are to be restrictions in fact of a station's operations, it is essential that the Commission monitor. Section 303 (b) and (c). Failure to enforce this type of restriction would produce chaos in administering the frequency

allotment program, and particularly in supervising the licensing of stations for limited purposes of communication. The Commission could hardly limit the character of the communications it authorizes a particular licensee to transmit, without having some way of ascertaining whether the licensee adheres to those limitations.

The licensing provisions of the Act are not the only sections which depend upon monitoring for enforcement. Others include: Section 303 (e) which concerns the purity and sharpness of the emissions from stations; Section 303 (f) dealing with interference between stations; Section 303 (h) under which the Commission may establish areas within which a station must provide service but beyond which it may not lay down a signal; Section 303 (m) which authorizes the Commission to suspend licenses of operators who transmit superfluous radio communications, or signals containing profane or obscene words or who knowingly transmit false or deceptive signals, or use a call letter not legally assigned or who willfully or maliciously interfere with any radio communication; Section 321 (b) which sets forth certain requirements concerning the transmission of distress signals; and Section 325 (a) which prohibits the transmission of false or fraudulent distress signals.

Moreover, other sections of the Act indicate specific recognition by Congress that monitoring was to be a method by which the Commission

would perform its duties. Thus, in Section 4 (f) (3), as amended in 1954 by 68 Stat. 729 (47 U. S. C., Supp. II, 154), reference is made to the "Field Engineering and Monitoring Bureau of the Federal Communications Commission." In Section 4 (g), as amended in 1952 by 66 Stat. 711 (47 U. S. C. 154 (g)), the authority of the Commission to acquire land for the construction of monitoring functions was made clear. This section merely confirms the action of Congress in 1934 when it established the present Commission and transferred to it the property of its predecessor, the Federal Radio Commission, including "monitoring radio stations" (47 U. S. C. 603).

In addition to the obligation to monitor imposed on the Commission by its own Act, the United States has bound itself to monitor its own radio transmitting stations by international agreement. Article 17 of the Radio Regulations annexed to the International Telecommunications Convention, Atlantic City, 1947, and made a part thereof by Article 13 of the Convention itself, requires each signatory to "take necessary steps for frequent checks to be made of the emissions of the stations under their jurisdiction." (Treaties and Other International Acts Series, Dept. of State No. 1901, pp. 375–377.) Article 18 of those Regulations provides for the making of the checks required by Article 17 "by means of moni-

toring stations." (*Ibid.* 377–381.)[7] It may be noted in passing that these same regulations, in a manner similar to the Communications Act, bar unauthorized disclosures of intercepted messages, with no indication that there was any inconsistency in the two provisions.[8]

A similar arrangement was entered into with various countries of the Western Hemisphere in Article 10 of the Inter-American Radio Agreement of 1949, effective April 13, 1952. 3 U. S. T. 3080, 3084.

There can be no doubt, of course, that powers and duties of federal officers may be based on an appropriate exercise of the treaty power as well as on the strict legislative power. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *United States* v. *Pink*, 315 U. S. 203.

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[7] This convention and the annexed regulations were subsequently ratified by the Senate and were signed by the President on February 10, 1949 (*ibid.*, pp. 761–762).

[8] Article 21 (*ibid.*, p. 409) provides:

"The administrations bind themselves to take the necessary measures to prohibit and prevent:

"(a) the unauthorized interception of radiocommunications not intended for the general use of the public;

"(b) the divulgence of the contents, simple disclosure of the existence, publication or any use whatever, without authorization, of information of any nature whatever obtained by the interception of the radiocommunications mentioned in 486."

B. THE STATUTORY PROHIBITION IN SECTION 605 OF THE ACT O THE INTERCEPTION AND DISCLOSURE OF RADIO COMMUNICA TIONS DOES NOT CANCEL THE COMMISSION'S MONITORIN AUTHORITY.

The petitioners rely upon Section 605 of the Communications Act (47 U. S. C. 605) as rendering illegal the monitoring activities of the Commission engineers. In pertinent part that section provides:

* * * * *

> and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

* * * * *

This is the provision held to bar the use of evidence received by wiretapping in *Nardone* v. *United States*, 302 U. S. 379, and *Weiss* v. *United States*, 308 U. S. 321.

The question we have here, then, is whether the monitoring authority which Congress gave with one hand, as established in the preceding section of this brief, it took away with the other through Section 605. This is a question quite

apart from the holdings of the wiretapping cases which have come before this Court and which dealt with communications by wire, not radio, and which did not involve the supervisory authority of the Federal Communications Commission. It is, moreover, purely a question of statutory construction, since under *Olmstead* v. *United States*, 277 U. S. 438, Congress could empower the Commission to monitor if it desired to do so. We believe that the evidence of Congressional intent, both at the time it adopted Section 605 and since then, shows that it did not intend to bar monitoring of radio communications by Commission engineers.

The first legislative attempt to safeguard private radio communications was contained in the Radio Act of 1912 (37 Stat. 302) which established federal control over interstate radio, and established licensing requirements for station operators, to be supervised by the Department of Commerce and Labor. The nineteenth section of that Act was captioned "Secrecy of Messages" and provided as follows:

> No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such

> message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.

Significantly, this provision related to radio "messages", treating them as comparable to telegrams, and prohibited, not intercepting, but "divulging or publishing". Its principal purpose was obviously to guard the secrecy of messages transmitted or received by commercial message centers engaged in the business of public communication.

The nineteenth section of the 1912 Act was subsequently replaced by Section 27 of the Radio Act of February 23, 1927 (c. 169, 44 Stat. 1172).[9]

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[9] This provided:

"No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of com-

Section 27 contained the following phrase, clearly comparable to the language of Section 605 at issue in this case:

> * * * and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person * * *.

In 1929, this Court handed down its decision in *Olmstead* v. *United States*, 277 U. S. 438, holding that the rule of exclusion, as to evidence obtained in violation of the Fourth Amendment, did not apply to evidence obtained through the tapping of telephone wires, even though the law of the

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petent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress."

state involved prohibited such practice.[10] Thereafter numerous bills were introduced to overcome the effect of the *Olmstead* decision in the 71st [11] and 72d Congress,[12] all of which failed of passage. There were also various hearings on the subject.[13] In 1934, the year that the Communications Act was enacted, proponents of wiretapping legislation succeeded in writing into the Department of Justice Appropriation Act for the year ending

[10] The pertinent provisions of the Washington statute involved in the *Olmstead* case, as set forth in the opinion in that case (*Ibid.*, p. 468), reads:

"Every person * * * who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor."

[11] H. R. 5416, H. R. 4139 and S. 6061; see 71 Cong. Rec. 5968.

[12] H. R. 23, H. R. 5305, H. R. 9893, and S. 1396; see 75 Cong. Rec. 4546, 4733; 74 Cong. Rec. 3928.

[13] The House Appropriations Committee held hearings on the 1931 Department of Justice Appropriation Bill, at which the question of wiretapping practices by the Department was explored. *Hearings of the Appropriations Committee of the House of Representatives on the Justice Department Appropriation Bill for the fiscal year 1931*, December 2, 1929, p. 63. This bill was debated in the House on January 22, 1931, and an amendment, which subsequently was defeated, was offered providing that no part of the appropriation could be used for tapping telephone or telegraph wires. 74 Cong. Rec. 2901–2906.

On February 19, 1931, a full study was made of the use of wiretapping by the House Committee on Expenditures in Executive Departments which heard the testimony of Attorney General Mitchell and Prohibition Director Woodcock. *Hearings, Committee of Expenditures in the Executive Departments*, February 19, 1931, pp. 5–14.

June 30, 1934 (approved March 1, 1933) a provision that no part of the appropriation would be used for or in connection with "wiretapping" to procure evidence of violations of the National Prohibition Act, 47 Stat. 1381. During all the various debates no mention was made of any desire to place restrictions on the Federal Radio Commission in its use of monitoring, which as we shall show (*infra*, pp. 40–44) had by that time become an established practice of that Commission. It seems evident, therefore, that when Section 605 was reenacted in the 1934 Act it was not intended to apply to monitoring by the Commission in enforcement of the regulation of radio contemplated by that Act. The only significant explanation of Section 605 was contained in House Report 1850, 73rd Cong., 2d Sess. (p. 9) and read:

> Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act, but is also made to apply to wire communications.

From this summary remark, one certainly cannot infer that Congress contemplated that the section would now apply—in contrast to Section 27 of the Radio Act—to monitoring by the Commission in enforcing its regulatory and licensing provisions.

During this same period of time, the practice of monitoring had become firmly established as an appropriate and necessary method of enforcing the Act.

In the years following the passage of the Radio Act of 1912 it became apparent to persons responsible for its administration in the Department of Commerce and Labor that effective enforcement of the licensing provisions of the communication laws would require some form of monitoring to ascertain whether the sending equipment was being operated in compliance with the law. In 1925, the first radio test car was put into use equipped with portable radio direction finding equipment for the use of monitoring and locating unlicensed transmitting equipment. This vehicle also had such frequency measuring equipment as was then available. The use of this equipment was so successful that by 1928 three additional cars were put into service by the Department of Commerce and, in 1929, four more. At that time the Radio Division of the Department of Commerce was divided into nine inspection districts, each having a district office equipped with various types of monitoring equipment including radio direction finding and frequency measuring devices. It became apparent at this time, however, that more extensive facilities were needed, and on February 21, 1929, the construction of a central frequency monitoring station to be built near the geographical center of the United States was authorized (45 Stat. 1255) and monies for this purpose were appropriated by Congress (45 Stat. 1636). Work on

this facility was begun in October 1929, and it was completed in 1931.

In 1931, on completion of the Central Frequency Monitoring station in Grand Island, Nebraska, a nation-wide monitoring system was established for the first time. The Grand Island facility was operated in conjunction with nine secondary frequency monitoring stations [14] to inspect the operation of radio stations all over the country. In addition, radio test cars were used in cooperation with the other units of the system especially for the purpose of locating low powered radio transmitters deviating from their assigned frequency.[15]

By 1932, the number of radio test cars had increased to eight, and there were ten monitoring stations in operation. In 1933, the entire Radio Division of the Department of Commerce was transferred to the Federal Radio Commission, and in the reorganization the total number of monitoring stations was reduced from 10 to 7.

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[14] These were strategically located at Hingham, Massachusetts; Fort McHenry, Baltimore, Maryland; Atlanta, Georgia; New Orleans, Louisiana; San Pedro, California; Larkspur, California; Portland, Oregon; Detroit, Michigan; Chicago, Illinois. Also there was a secondary monitoring station at Grand Island, Nebraska, which had just been completed.

[15] A detailed description of the monitoring service as it had developed up to July 1, 1931, is contained in a Department of Commerce monograph entitled "Radio Activities of the Department of Commerce." (G. P. O. July 1, 1931.)

By 1934, when the Communications Act was passed, the nation-wide monitoring systems was so well established as to merit scant attention by Congress except to the extent that its facilities were transferred by Section 603 (b) of the new legislation from the Federal Radio Commission to the Federal Communications Commission. It is apparent, however, that Congress intended no important departures in federal supervision of radio under the new Act. The report on the bill (H. Rep. No. 1850, 73d Congress, 2d sess., p. 3) stated:

> * * * it is the primary purpose of this bill to create such a commission armed with adequate statutory powers to regulate all forms of communication and to consider needed additional legislation. The bill is largely based upon existing legislation and except for the change of administrative authority does not very greatly change or add to existing law; most controversial questions are held in abeyance for a report by the new commission recommending legislation for their solution.

There is thus no indication that Congress intended to cut down the practice of monitoring, which had never been challenged under either of the two previous radio acts, despite the presence in those statutes of provisions comparable to Section 605 of the 1934 Act.

Following passage of the Communications Act, the Federal Communications Commission con-

tinued to monitor in enforcing the various provisions of the Act. In the Sixth Annual Report of the Federal Communications Commission for Fiscal Year Ending June 30, 1940, this function of the Commission was described as follows (*ibid.*, pp. 11–12):

> In administering and enforcing laws, regulations, and international treaties pertaining to radio, the Commission depends in large measure on its field staff. The ether waves are, in effect, patrolled by field offices strategically located throughout the United States and its possessions, augmented by seven main monitoring stations. The latter are at Atlanta, Baltimore, Boston, Grand Island (Nebr.), Allegan (Mich.), San Pedro (Calif.), and Portland (Oreg.).
>
> Monitoring stations are the Commission's "listening posts." In general, they do not participate in the investigation of unauthorized transmission other than to report and record such signals as proof of operation. The task of tracing unlicensed stations is performed mainly by inspectors. The latter are radio engineers and, in addition, are capable radio operators. Many have had previous experience in military, maritime, aviation, and other communications services. They are familiar with technical procedure, which is of material aid in uncovering illicit use of radio.
>
> At each radio district headquarters, specially equipped automobiles are provided

for investigation work. Some of these cars are equipped with all-wave receivers which, when necessary, may be removed from the car for operation. The mobile equipment is also used to transport examination and technical equipment.

Besides seeking out unlicensed operators, the Commission's field staff inspects all classes of radio stations—broadcast, police, ship, amateur, aviation, etc.; examines radio operators for various classes of licenses; monitors radio transmission for adherence to frequency, quality of emission, and compliance with prescribed procedure; conducts field strength surveys and analyzes signal characteristics; and investigates complaints of interference to radio reception. During the last fiscal year the Commission investigated more than 1,000 complaints of unlicensed operation, and the number of these and other cases pressing for investigation is growing under the present situation.

Moreover, Congress has continued to recognize the Commission's use of monitoring, after the original adoption of the provision against interception and divulgence in the 1927 Radio Act, prior to, contemporaneously with, and subsequent to, the reenactment of the section in 1934. In the period between 1927 and 1934, Congress specifically authorized the purchase of land for monitoring (45 Stat. 1255; 46 Stat. 164, 872; 48 Stat. 805). Contemporaneously with the re-

enactment of the prohibition, Congress provided in Section 603 (b) for the transfer of monitoring facilities from the old Commission to the new. And since 1934 Congress, in addition to making annual appropriations for monitoring, has through amendments to Sections 4 (f) (3) and 4 (g) made specific reference to the monitoring functions of the Commission.[16]

Bearing in mind that the issue is one of statutory construction, we submit that the indications are clear that Congress did not intend to limit the Commission's powers and duties of inspection, including monitoring, by Section 605.

C. THE APPLICATION OF THE GENERAL MONITORING AUTHORITY TO THE OPERATIONS OF PETITIONERS' STATION WAS PARTICULARLY APPROPRIATE

As pointed out in the Statement, *supra*, pp. 6–7, petitioners' station was licensed for industrial use only in connection with the petitioners' farming operations. As was also pointed out, frequencies assigned for such uses are not exclusively allocated to the use of an individual licensee, but are shared with other industrial users. (47 C. F. R. 11.8). The signal from petitioners' station had a range of a 70-mile radius, an area

[16] This Court has recognized that Congress in effect ratifies administrative interpretations of its legislation when it appropriates funds to implement administrative action taken pursuant to such interpretations. *Ibrandtsen-Moller Co., Inc.* v. *United States*, 300 U. S. 139, 147; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116.

which extended into California and Mexico (R. 44). Thus, while monitoring of all radio communications is an essential part of the Commission's enforcement of the Communications Act, these factors made it particularly appropriate, and necessary, to include monitoring in the inspection of petitioners' operations.

The fact that petitioners were operating on a frequency shared with others has two consequences. One is that its communications must constantly be listened to by others than the immediate sender and the intended receiver. Not only the chance dial-twiddler and the youthful radio enthusiast, but also the petitioners' co-licensees for industrial use on the particular channel, can and must be expected to hear communications transmitted from their station. In other words, this is a party line of huge dimensions reducing privacy to an absolute minimum.

The second result of the sharing of the frequency is the need that the use of the station be limited to the purposes for which it was licensed. One licensee should not be permitted to "hog" the air to the detriment of his neighbors; his messages are required to be held to the minimum necessary to carry on his particular industrial use (47 C. F. R. 11.151 (a)). In such a situation, particularly, monitoring is an appropriate method of enforcement.

The location of petitioners' station also illustrates the appropriateness of monitoring it. The engineers testified that at times during their operation they were within 75 feet of the Mexican border (R. 43). This certainly brings into play the obligation of the United States under the treaties referred to above (*supra*, pp. 32–33) to police the international aspects of radio communication.

These factors are adverted to not because we believe the Commission's authority to monitor is restricted to this type of operation: on the contrary, there is not the slightest indication in the grant of authority discussed in Point IA, or the legislative history discussed in Point IB, that the Commission should not monitor wherever and whenever it is necessary and appropriate in carrying out its functions. However, the particular facts of this particular operation illustrate vividly the near-absurdity of questioning the Commission's authority here. On the one hand, the Commission could not enforce the requirements of the Act and the regulations in this crowded field if it could not listen at will to petitioners' transmissions; on the other hand, petitioners can hardly claim any real invasion of privacy when their communications are necessarily open to the ears of all who care to tune-in and listen.

II. INFORMATION LAWFULLY ACQUIRED THROUGH AN AUTHORIZED MONITORING OPERATION MAY BE USED FOR ALL PURPOSES IN PREPARING FOR AND TRYING A CASE FOR VIOLATION OF ANY FEDERAL CRIMINAL LAW

The court below held that, although engineers of the Federal Communications Commission appeared to be authorized to monitor for purposes of enforcing the Communications Act, they could not turn over to prosecuting officials information as to violation of other federal laws. The only authorities cited for this position, that evidence lawfully obtained is to be limited in its use, were *Weeks* v. *United States,* 232 U. S. 383, *Nardone* v. *United States,* 302 U. S. 379, and 308 U. S. 338, and *Weiss* v. *United States,* 308 U. S. 321.

This Court explained in the *Weiss* and *Nardone* cases, which deal directly with the application of Section 605 of the Communications Act to evidence obtained by intercepting messages transmitted by wire, that since Section 605 renders the interception and divulgence of telephone messages illegal, the Court would bar the use of such evidence, or other information secured by following it up, in evidence. Thus, the Court followed its earlier precedent, established in the *Weeks* case, that the use in evidence of information gained by an illegal search or seizure is forbidden. In both types of cases the judge-made rule of evidence was established as a sanction to discourage illegal wiretapping, or illegal searches and sei-

zures, by denying prosecutors all benefits from the prohibited activity. Cf. *Walder* v. *United States,* 347 U. S. 62, 65; *Rea* v. *United States,* 350 U. S. 214. But the rule of exclusion is not applied where the official action of search or inspection is *not* illegal, or where, even though it is illegal, justice would not be served by an automatic application of the *Weeks* and *Nardone* principle. Cf. *Walder* v. *United States, supra; Carroll* v. *United States,* 267 U. S. 132; *Brinegar* v. *United States,* 338 U. S. 160.

In the light of these objectives and limitations of the exclusion principle, it is submitted that the court below erred in extending the rule of the wiretapping cases to the case before it. The significant distinctions in the situations make the application of the rule entirely inappropriate—Commission monitoring is wholly lawful (as we have shown) and carries no stigma or taint whatsoever.

In the first place, there is not here involved any type of private communication surreptitiously intercepted. Instead, petitioners were in effect shouting from their rooftop to anyone who wished to listen, well aware that strangers must overhear their messages. In particular they were fully aware when they received their license that the Commission could, and might well, monitor their operations (*supra,* pp. 8–9). It was as though a person mailing a package as third-class mail with a sticker saying, "Postmaster, This

may be opened for inspection," should object when his invitation was accepted.[17] These applicants took their license subject to the right of the Commission to monitor; they cannot object when that right is exercised.

But even more significant, those who overheard in this case were authorized by Congress to do so. The monitoring activities of the Federal Communications Commission engineers were not only not illegal; they were authorized, and in fact required, as a part of the Commission's statutory duties. The fact that their monitoring disclosed violations of the immigration law as well as violations of the Communications Act cannot make illegal what would otherwise be legal. And if there was no illegality in the listening and no violation of privacy, there is no public interest to be served by denying the Government the use of the information as evidence in any case in which it may be pertinent.

Again, an analogy to third class mail suggests itself. Suppose that the postal inspector in inspecting a package finds not only that it contains hand-written messages, which may not be mailed in that class, but also that the contents of the messages constitute threats against the life of the President. Surely, those documents can be turned over to the proper authorities for

[17] In *Ex parte Jackson*, 96 U. S. 727, this Court stated that the right of privacy accorded to first-class mail did not apply to matter open to examination.

appropriate action, even though postal inspectors are concerned primarily with law enforcement within the postal field. In sending mail third-class, one knows that it is open for inspection by the postal authorities, and those officials act with full legality when they open and inspect such mail. That is precisely the situation here.

Similarly, when a policeman, upon lawfully arresting a man for one felony, searches his person and discovers evidence of another crime, that evidence is indisputably admissible. See *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Harris* v. *United States*, 331 U. S. 145, 151, 168. The broad principle is the same—where the act of "inspection" is fully lawful its fruits may be used though they were unanticipated. The same is true of every search or seizure which is lawfully made, whether because a valid warrant has been issued or because there is probable cause to believe illegal activities are being carried on in a movable vehicle or otherwise. If the search or seizure or inspection is wholly lawful in itself, there is no reason or rule to exclude whatever evidence may be uncovered in its course.

A recent case in this Court involving this general principle is *Zap* v. *United States*, 328 U. S. 624 (reversed on other grounds, 330 U. S. 800), where federal agents were conducting an audit in connection with a cost-plus war contract. A check was discovered supporting a charge that

there had been a violation of the False Claims Act. The agents retained this check, and its use in evidence was upheld by this Court. The Court stated (p. 629):

> The agents, therefore, were lawfully on the premises. They obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection. They were not trespassers. They did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the Government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge. * * *

In *Harris* v. *United States*, 331 U. S. 145, a search was conducted in connection with a valid arrest under an arrest warrant and evidence was discovered and seized which related to a separate offense from that leading to the arrest. In upholding the use of this evidence, the Court stated at page 155:

> * * * If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that

such property is on the premises when the search is initiated.[18]

In important respects the circumstances of the instant case make it even *a fortiori* from these precedents. No Fourth Amendment issue is involved in the interception of communications. *Olmstead* v. *United States*, 277 U. S. 438. And, furthermore, there was in this case no seizure of any kind, no taking or retention of physical property of the petitioners, a factor considered of great significance in the dissents in the *Zap* and *Harris* cases. Moreover, the information they turned over to the United States attorney was not collateral information they happened upon; but the

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[18] Much earlier, in passing upon a comparable issue with respect to the right to use evidence in the New York courts, this Court stated in *Adams* v. *New York*, 192 U. S. 585, 598:

"* * * The right to issue a search warrant to discover stolen property or the means of committing crimes, is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

identical communications they were legally authorized to monitor.

In some respects the case is similar to, but stronger than, *On Lee* v. *United States*, 343 U. S. 747, and *Goldman* v. *United States*, 316 U. S. 129, in that there was here no intrusion upon the petitioners' property without their consent. There was, of course, a listening to their radio communications, but, if that was authorized by law as we argue above, the result should be the same, particularly since that listening was a proper condition of their license to operate.

Or the factual situation may be compared with that in *Milam* v. *United States*, 296 Fed. 629 (C. A. 4), where the court stated at p. 632:

> The case before us is this: Federal prohibition officers, having definite information that professional criminals were conveying in a motor car a quantity of whiskey along a certain road about a certain time, were on the watch to intercept it. They stopped the defendants' truck, opened it, and found, instead of whiskey, Chinamen in the course of unlawful transportation. Assuming that this was a search of the truck, under these circumstances we hold that the search was not unreasonable, and that the evidence obtained was competent.

See also *Steele* v. *United States*, 267 U. S. 498; *United States* v. *Two Soaking Units*, 48 F. 2d 107 (C. A. 2), certiorari denied, 284 U. S. 627; *Paper* v. *United States*, 53 F. 2d 184 (C. A. 4); *United*

States v. *Old Dominion Warehouse, Inc.*, 10 F. 2d 736 (C. A. 2).[19]

Before we leave this point, it may be appropriate to express a word of caution with respect to the limits of our position in this case. In pointing out the nature of the petitioners' operations on a frequency shared with others, we do not mean to imply that Section 605 of the Communications Act has under other circumstances either full, partial or no application to the interception and use of such messages. There is before the Court only the question of monitoring by Commission engineers in the performance of their normal functions; the Court is not called upon to consider the situation where private persons intercept messages and use them for personal profit. Nor need the Court consider situations where authorized Commission monitors acquire information as to the contents of messages being transmitted by radio and disclose them to others for personal profit or other ends improper in themselves. Also, this case does not involve interception by government officials other than Commission personnel. The case deals solely with official Commission monitoring and the disclosure of criminal acts to a coordinate branch of the government for official use.

[19] An analogy could also be drawn to a similar situation where this Court refused to apply the *McNabb* rule to a confession obtained from a prisoner committed for a different offense from that which was the subject of the confession. *United States* v. *Carignan*, 342 U. S. 36.

III. IN ANY EVENT, THE TRANSMISSIONS IN THIS CASE WERE WHOLLY ILLEGAL UNDER THE COMMUNICATIONS ACT AND THEREFORE NOT WITHIN THE PROTECTION OF SECTION 605.

The admissibility of the evidence in this case may also be sustained on the narrower ground relied upon by the court below, although not carried to the full extent of its rationale, *i. e.,* that the transmissions in this case, being illegal under the Communications Act, were not within the protection of Section 605. Since the section is designed to protect the system of communication which the act regulates (*Goldman* v. *United States,* 316 U. S. 129, 133), it cannot have been intended to protect communications which are outside of, and in violation of, the system which the Act and the regulations are designed to establish. As the court below said (R. 93), "before any right of privacy exists under Section 605 the voice must be legally on the air." Section 605 was not designed to throw a mantle of protection over communications sent in violation of the very Act under which the protection is granted.

The court below, in the only other reported case on the question, had reached the same conclusion with respect to unlicensed broadcasts in *Casey* v. *United States,* 191 F. 2d 1.[20] There, the

[20] Although the *Casey* case was ultimately reversed by this Court (343 U. S. 808), the reversal was on the basis of a confession of error by the government limited to the issue of whether the search by government agents of an automobile

defendants, operating unlicensed equipment, had the results of races transmitted from the track immediately in time to have a bet placed with a bookie on the winning horse before the results of the race were generally known. The operations were first discovered by amateur radio operators (illustrating the practical impossibility of privacy). The radio was eventually located by Commission engineers through the use of mobile equipment. The court of appeals, as in the instant case, deemed the fact that the transmission was unlicensed the controlling factor in reaching its conclusion that the transmissions were not protected by Section 605 (191 F. 2d at p. 4). It might, however, have reached the same conclusion on the basis that, since the "means" of communication involved constituted a criminal violation of the Communications Act, no transmissions were within the protection of Section 605.

To the extent that the legislative history of Section 605 bears on the subject, it supports this construction since Congress had ample notice of the practice of policing unlicensed and illegal operations prior to its reenactment of Section 605 in 1934. Under the Radio Act of 1927, the Federal Radio Commission customarily investigated var-

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and seizure of its contents for use in evidence was an unreasonable search and seizure. The question of the proper construction of Section 605, as applied to illegally transmitted radio communications, was excepted from the government's concession. See Br. for U. S., pp. 23–25, No. 379, O. T. 51.

ious types of violations involving both unlicensed and unauthorized operation of radio equipment. In some cases it merely took administrative action against the persons involved. In other cases it referred the evidence to the Department of Justice for prosecution. The activities of the Federal Radio Commission in this field just prior to the passage of the 1934 Act are set forth in the Sixth Annual Report of the Federal Radio Commission for the Fiscal Year 1932, pp. 12–15. This report stated (*Ibid*, p. 15) "the violations dealt with are primarily of two types: (1) Plain violations of the criminal provisions of the Radio Act of 1927, and (2) violations of the criminal provisions of the Radio Act of 1927 in conjunction with other illegal activities, such as smuggling or rum running." One of the cases of the latter type in which the Radio Commission had participated in that year (*United States* v. *Frederick H. Simpson*) involved the unlawful operation of a radio station whose signals were used in connection with rum-running boats (*ibid.*, p. 14), a situation closely analogous to the instant case.

If Section 605 does protect only voices "legally on the air," then all the evidence in this case was without the scope of that section. None of the transmissions involved were legal under the Communications Act. The illegality does not lie solely in the fact that, with the possible exception of September 18, 1953, petitioners were operating without permits, in violation of Section 318 of

the Act (*infra*, p. 68).[21] Even had they been fully licensed at all times, the use to which they put their transmitting equipment was completely outside the very limited authority conferred by their license and consequently outside of the protection of any right of privacy of communication to which they are entitled under Section 605 of the Act.

Section 301 (47 U. S. C. 301) of the Communications Act, pertaining to the licensing of radio communications, specifically provides that "no * * * license shall be construed to create any right, beyond the terms, conditions, and periods of the license" and that "no person" shall use such facilities except in accordance with the requirements of the Act and his license. Another section of the part of the Act pertaining to "station licenses; form and conditions" provides (47 U. S. C. 309 (d)):

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[21] Section 318 prohibits the operation of a station required to be licensed except by a person holding an operator's license. The court of appeals assumed that petitioners became authorized to transmit on September 17, 1953, the date their operators' permits were issued by the Federal Communications Commission from the Los Angeles office (R. 93), and therefore, that petitioners were "legally on the air" after that date. However, the regulations require that operators' permits be in the actual possession of the sender while operating a base station (47 C. F. R., 1953 ed., 11.155, *supra*, p. 16). Since the date of receipt is not shown, it is not clear on this record whether petitioners were qualified to transmit for any purposes on September 18, 1953, the last day that any monitoring occurred.

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> Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; * * *.

The station license issued to petitioners for the special use of a radiotelephone on their farm was issued pursuant to Section 301, and the conditions prescribed under subsection K of Part 11 of the Commission's Regulations 47 C. F. R. [1953 ed.] (see Section B of the Statement, *supra*, pp. 12–17). These regulations provide for the issuance of radio station licenses "to various industrial enterprises which, for safety purposes or other necessity, require radio transmitting facilities in order to function efficiently." *Ibid.*, 11.1 (*supra*, p. 12). Under the Act and the regulations, therefore, petitioners were limited in their use of the radio transmitting equipment to the kind of activity described in their application for a station license and noted on the license itself, *viz.*, for farming operations (see *supra*, pp. 6–7). They were certainly not authorized to use the radio as the very means of violating the criminal laws of the United States relating to illegal immigrants.

There are many situations in the law where a privilege attaching to a relationship or transaction is removed when a criminal activity is directly involved. For example, the privilege against disclosure of communications between a lawyer and his client is refused if the relationship has been the means of perpetrating a crime or a fraud. *Clark* v. *United States,* 289 U. S. 1; *United States* v. *Bob,* 106 F. 2d 37 (C. A. 2), certiorari denied, 308 U. S. 589; *Regina* v. *Cox,* [1884] 14 Q. B. D. 153. And so here the license was to carry on legitimate farm operations, not to perform the criminal act of harboring aliens illegally in the United States.

The transmissions here involved were thus wholly outside the scope of petitioners' license and in violation of the Act and regulations of the Commission, irrespective of the absence of operators' licenses. They were thus wholly outside the protection of Section 605—even if it be construed to cover the divulgence of some information obtained through Commission monitoring—and *in toto* admissible in evidence against petitioners.

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CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below should be affirmed.

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Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

APRIL 1956.

APPENDIX A

The following provisions of the Communications Act of 1934, 48 Stat. 1064, c. 652, as amended, are pertinent to this case (as they appear in Title 47 of the United States Code):

47 U. S. C. 301:

License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the

borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U. S. C. 303:

Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

* * * * *

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in con-

struction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter.

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 U. S. C. 309 (d):

Station licenses; form and conditions.

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies

designated in the license beyond the term thereof nor in any other manner than authorized therein; * * *

47 U. S. C. 318

Transmitting apparatus; operator's license.

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: *Provided, however,* That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: *Provided further,* That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

47 U. S. C. 401:

Enforcement of chapter and orders of Commission; jurisdiction.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the

Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

47 U. S. C. 501:

General Penalty.

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

47 U. S. C. 605:

Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels, of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distribut-

ing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

IN THE MATTERS OF—

Docket No. 10780

JEAN S. SUGDEN, YUMA, ARIZONA

Docket No. 10781

ROBERT V. H. SUGDEN, YUMA, ARIZONA

SUSPENSION OF RESTRICTED RADIOTELEPHONE OPERATOR PERMITS

Docket No. 10740

ROBERT V. H. SUGDEN, ROUTE 1, BOX 629, YUMA, ARIZONA

ORDER TO SHOW CAUSE WHY THE LICENSE FOR SPECIAL INDUSTRIAL STATION KOG-285 SHOULD NOT BE REVOKED

Order

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 14th day of October, 1954;

The Commission having under consideration a joint motion filed on September 17, 1954 by the Chief of its Field Engineering and Monitoring

Bureau and its Safety and Special Radio Services Bureau requesting cancellation of the permits and licenses involved and dismissal of the above-entitled proceedings with prejudice;

It Appearing, That on October 28, 1953 the Commission adopted orders suspending the Restricted Radiotelephone Operator Permits of Jean S. Sugden and of Robert V. H. Sugden for a period of the remainder of the license terms and simultaneously therewith issued an order directing that Robert V. H. Sugden appear at a hearing to be held in Washington, D. C. and show cause why the license of his Special Industrial Station KOG–285 should not be revoked; and

It Further Appearing, That Robert V. H. Sugden entered an appearance in the said revocation proceeding and that Jean S. Sugden and Robert V. H. Sugden requested hearings on the suspension of their said operator permits under the provisions of Section 303 of the Communications Act of 1934, as amended, and Section 1.404 of the Commission's Rules Relating To Practice and Procedure and accordingly on November 25, 1953 orders were adopted designating the said orders of suspension for hearing; and

It Further Appearing, That on July 22, 1954, the Commission received the said operator permits of Robert V. H. Sugden and of Jean S. Sugden and the license for Station KOG–285 with requests by these parties for cancellation of said permits and license and accordingly petitioners allege that no useful purpose would now be served by proceeding with the above-entitled hearings and request cancellation of the said permits and license and dismissal of the said hearing proceedings; and

It Further Appearing, That the matters giving rise to suspension of the said permits and issuance of the said Order to Show Cause are now the subject of certain proceedings instituted by the United States Department of Justice in the United States District Court in the District of Arizona and that the administrative proceedings herein were designed to determine solely whether the authorizations issued by this Commission to Robert V. H. Sugden and Jean S. Sugden should be terminated and therefore surrender by these parties of the said permits and license for cancellation nullifies the purpose for which the hearings herein were ordered and accordingly no useful purpose would be served by proceeding with such hearings, but that it is inappropriate to dismiss them with prejudice as requested;

It Is Ordered, That the said petition is granted insofar as it requests cancellation of the Restricted Radiotelephone Operator Permits of Jean S. Sugden and Robert V. H. Sugden and the license of Station KOG–285 and dismissal of the above-entitled proceedings and is denied insofar as it requests dismissal with prejudice and the said permits and license are cancelled and the above-entitled proceeding are dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING, *Acting Secretary.*

Released October 14, 1954.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

Docket No. 10740

IN THE MATTER OF REVOCATION OF LICENSE OF SPECIAL INDUSTRIAL STATION KOG-285, ROBERT V. H. SUGDEN, ROUTE 1, BOX 629, YUMA, ARIZONA

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 28th day of October, 1953;

The Commission having under consideration alleged violations of the Communications Act of 1934, as amended, and the Rules of the Commission committed by the licensee of the above-described station during the course of the operation thereof;

It appearing, That on August 26, 1953, Robert V. H. Sugden was authorized to operate under the call sign KOG-285 a station in the Special Industrial Radio Service governed by Part 11 of the Commission's Rules; and

It Further Appearing, That on August 23, 1953, Robert V. H. Sugden wilfully transmitted or caused to be transmitted communications and signals by radio in violation of Section 301 of the Communications Act; and

It Further Appearing, That during the period from September 4 to September 18, 1953, Station

KOG–285 was wilfully operated in a manner contrary to the public interest, the terms of the license, the law and the Commission's regulations in the following particulars:

(a) Unauthorized communications in violation of Section 11.151 of the Rules of the Commission were repeatedly transmitted by the licensee over the facilities of his station;

(b) The station was operated on several occasions by a person who was not a holder of an appropriate operator authorization issued by the Commission in violation of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Commission's Rules;

(c) No frequency, power, and modulation measurements were made as required by Section 11.108 of the Commission's Rules;

(d) No station records were maintained as required by Section 11.160 of the Commission's Rules;

(e) The Commission's Engineer in Charge of the district in which Station KOG–285 is located was not notified prior to the commencement of the station's operation as required by Section 11.52 (c) of the Commission's Rules.

It Further Appearing, That Station KOG–285 was repeatedly used by the licensee thereof in connection with and in furtherance of illegal activities violative of the laws of the United States and was used to thwart the efforts of the officers of the Immigration and Naturalization Service to enforce the Immigration and Nationality Act;

It Is Ordered, Pursuant to Section 312 (c) of the Communications Act of 1934, as amended, that Robert V. H. Sugden show cause why the

license of his Special Industrial Station KOG-285 should not be revoked; and

It Is Further Ordered, That a hearing in this matter will be held in Washington, D. C., on the 1st day of December, 1953, in order to determine whether an Order revoking said license should be issued and that Robert V. H. Sugden is herewith called upon to appear at this hearing and give evidence upon the matters specified herein;* and

It Is Further Ordered, That the Secretary shall mail a copy of this Order to the licensee by Registered Mail—Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING, *Acting Secretary.*

Released October 29, 1953.

*Section 1.102 of the Commission's Rules provides that in order to avail himself of the opportunity to appear before the Commission at the time and place specified in the Show Cause Order, the licensee shall within thirty (30) days from the date of receipt of this Order inform the Commission in writing whether he will appear or whether he waives his rights to a hearing. Waiver of a hearing may be accompanied by a statement of reasons why said licensee believes that an Order of Revocation should not be issued. A waiver unaccompanied by such a statement will be deemed to be an admission of the allegations specified in this Order. Failure to respond within the above 30-day period, or failure to appear at the hearing, will be deemed to be a waiver of the right to a hearing and an admission of the allegations specified in the Order to Show Cause.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D. C.

Docket No. 10780

IN THE MATTER OF JEAN S. SUGDEN, YUMA, ARIZONA, SUSPENSION OF RESTRICTED RADIOTELEPHONE OPERATOR PERMIT

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 25th day of November, 1953;

It Appearing, That acting in accordance with the provisions of Section 303 (m) (2) of the Communications Act of 1934, as amended, Jean S. Sugden, Yuma, Arizona filed with the Commission within the time provided therefor an application requesting hearing on the Commission's order of October 28, 1953 suspending for a period of the remainder of the license term her Restricted Radiotelephone Operator Permit PR-11-71027; and

It Further Appearing, That under the provisions of Section 303 (m) (2) of the Communications Act of 1934, as amended, said licensee is entitled to a hearing in the matter; and that upon the filing of a timely written application therefor the Commission's order of suspension is held in abeyance until the conclusion of the proceeding in the said matter.

It Is Ordered, This 25th day of November 1953 that the matter of the suspension of the Restricted Radiotelephone Operator license of Jean S. Sugden is hereby designated for hearing before a Commission examiner in the offices of the Commission in Washington, D. C., at 10:00 a. m. on June 1, 1954, upon the following issues:

(1) To determine whether at any time between September 4 and September 18, 1953, inclusive, Jean S. Sugden wilfully operated a unit of radio station KOG–285 to transmit unauthorized communications in violation of Section 11.151 (a) of the Commission's rules and the terms of the station license.

(2) To determine if Jean S. Sugden, between September 4 and September 18, 1953, inclusive, operated a unit of radio station KOG–285 without holding a radio operator license or permit issued by the Commission in violation of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) of the Commission's rules.

(3) If the licensee committed such violation, to determine whether the facts or circumstances in connection therewith would warrant any change in the terms of the Commission's order of suspension.

It Is Further Ordered, That a copy of this order be transmitted by registered mail, return receipt requested to Jean S. Sugden, Yuma, Arizona.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING, *Acting Secretary.*

Released December 1, 1953.

APPENDIX C

In the United States District Court in the District of Arizona

No. C—Phoenix

United States of America, plaintiff

v.

Robert V. H. Sugden, defendant

Indictment

Viol: 47 U. S. C. 318 and 501 (Communications Act)

The grand jury charges:

Count One

That on or about August 23, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for transmission of energy or communications or signals by radio to wit: radio-telephone transmitters installed in motor vehicles and did send radio communications or signals into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona without a license having first been granted in his behalf by the Federal Communications Commission as required by Section 301 of the Communications Act of 1934, as

amended, in violation of Title 47 United States Code, Section 501, as amended.

COUNT TWO

That on September 4, 1953 in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and to send radio communications or signals into channels of interstate or foreign radio transmissions operated by Jean S. Sugden, the effects of which extended beyond the borders of the State of Arizona, knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT THREE

That on September 5, 1953, in Yuma County, Arizona, within the District of Arizona, Defend-

ant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and operated by Jean S. Sugden, to send radio communications or signals into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona, the said Robert V. H. Sugden, knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG–285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT FOUR

That on September 9, 1953 in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and operated by Jean S. Sugden, to send radio communications or signals into channels of interstate or foreign radio

transmission, the effects of which extended beyond the borders of the State of Arizona, the said Robert V. H. Sugden knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under the license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG–285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT FIVE

That on September 10, 1953, in Yuma County, Arizona, within the district of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly permit and cause certain apparatus for the transmission of energy, communications and signals by radio, to be used and operated by Jean S. Sugden, to send radio communications or signals into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona, the said Robert V. H. Sugden knowing that said Jean S. Sugden had not been first issued a radio operator's license or permit by the Federal Communications Commission in accordance with the

provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Jean S. Sugden being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license by said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47 United States Code, Sections 318 and 501, as amended.

COUNT SIX

On September 4, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications

Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmission of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

COUNT SEVEN

On September 5, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmissions of (a) communications related directly to the safety of life or the protection of property and (b) communications con-

sidered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

COUNT EIGHT

On September 9, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmission of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

Count Nine

On September 10, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmissions of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

Count Ten

On September 18, 1953, in Yuma County, Arizona, within the District of Arizona, Defendant Robert V. H. Sugden did wilfully and know-

ingly use and operate certain apparatus for the transmission of energy, communications and signals by radio, to wit: radio base station KOG-285, by transmitting communications with respect to the transportation and concealment of aliens who had entered the United States illegally, into channels of interstate or foreign radio transmission, the effects of which extended beyond the borders of the State of Arizona and which communications were not related directly to the safety of life or the protection of property nor essential to the efficient conduct of Defendant's general farming business, in violation of the restrictions and conditions of the license issued to him by the Federal Communications Commission for said station and the provisions of Section 11.151 (a) of the Rules and Regulations of the Federal Communications Commission, which license and rules restricted Robert V. H. Sugden in operating said station solely to transmission of (a) communications related directly to the safety of life or the protection of property and (b) communications considered essential to the efficient conduct of the general farming business of said Robert V. H. Sugden, in violation of Title 47, United States Code, Section 502, as amended.

A true bill.

(Signed) J. CLAYTON BAIN,
Deputy Foreman.

EDWARD W. SCRUGGS,
United States Attorney.

_____,
Assistant United States Attorney.

In the United States District Court in the District of Arizona

No. C–11557—Phoenix

UNITED STATES OF AMERICA, PLAINTIFF
v.
JEAN S. SUGDEN, DEFENDANT

Indictment

Viol: 47 U. S. C. 318 and 501 (Communications Act)

The grand jury charges:

COUNT ONE

On September 4, 1953, in Yuma County, Arizona within the District of Arizona Defendant Jean S. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona without a radio operator's license or permit having first been issued by the Federal Communications Commission to said Defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (c) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Defendant being then and there set up as a radio station in the Special Industrial Radio Service for which a radio sta-

tion license is required under said Act, and which station was on said date under license from said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG–285, in violation of Title 47, United States Code, Sections 318 and 501, as amended.

COUNT TWO

On September 5, 1953, in Yuma County, Arizona within the District of Arizona, Defendant Jean S. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona, without a radio operator's license or permit having first been issued by the Federal Communications Commission to said Defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license from said Federal Communications Commission to said Title 47, United States Code, Sections 318 and 501, as amended.

COUNT THREE

On September 9, 1953, in Yuma County within the District of Arizona, Defendant Jean S.

Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona without a radio operator's license or permit having first been issued by the Federal Communications Commission to said defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (e) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Defendant being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license is required under said Act, and which station was on said date under license from said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47, United States Code, Sections 318 and 501, as amended.

COUNT FOUR

On September 10, 1953 in Yuma County within the District of Arizona Defendant Jean S. Sugden did wilfully and knowingly use and operate certain apparatus for the transmission of energy, communications and signals by radio and did send radio communications or signals into channels of interstate or foreign radio transmission, the effect of which extended beyond the borders of the State of Arizona without a radio operator's license or permit having first been

issued by the Federal Communications Commission to said Defendant in accordance with the provisions of Section 318 of the Communications Act of 1934, as amended, and Section 11.154 (c) (1) of the Rules and Regulations of the Federal Communications Commission, the said apparatus used and operated by said Defendant being then and there set up as a radio station in the Special Industrial Radio Service for which a radio station license as required under said Act, and which station was on said date under license from said Federal Communications Commission to said Robert V. H. Sugden as base radio station KOG-285, in violation of Title 47, United States Code, Sections 318 and 501, as amended.

A true bill.

———— ————,
Deputy Foreman.

EDWARD W. SCRUGGS,
United States Attorney.

———— ————,
Assistant United States Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1936

APRIL 30, 1956.

Decisions Per Curiam.

No. 555. SUGDEN ET UX. *v.* UNITED STATES. Certiorari, 350 U. S. 952, to the United States Court of Appeals for the Ninth Circuit. Argued April 25, 1956. Decided April 30, 1956. *Per Curiam:* The judgment is affirmed. MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS dissent. *Mark Wilmer* argued the cause for petitioners. With him on the brief was *Frank L. Snell*. *John F. Davis* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Olney*, *Beatrice Rosenberg* and *Carl H. Imlay*. Reported below: 226 F. 2d 281.